TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1962

No. [redacted] 77

JOHN R. JONES, PETITIONER

vs.

W. K. CUNNINGHAM, JR., SUPERINTENDENT OF VIRGINIA STATE PENITENTIARY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 26, 1961
CERTIORARI GRANTED MARCH 5, 1962

Supreme Court of the United States

OCTOBER TERM, 1961

No. 766

JOHN R. JONES, PETITIONER

vs.

W. K. CUNNINGHAM, JR., SUPERINTENDENT OF VIRGINIA STATE PENITENTIARY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

INDEX

[fol. 3]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA AT RICHMOND, VIRGINIA

JOHN R. JONES, PETITIONER

vs.

W. K. CUNNINGHAM, JR., SUPT. VIRGINIA STATE PENITENTIARY, RESPONDENT

PETITION FOR A WRIT OF HABEAS CORPUS AD SUBJICIENDUM—Filed Feb. 2, 1961

To the Honorable Justice of the Aforesaid Court:

Before this Honorable Court comes now JOHN R. JONES, hereinafter referred to as "petitioner", who alleges and will show unto this Honorable Court that he is unlawfully held, imprisoned and restrained of his liberty at the Virginia State Penitentiary Farm, Goochland, Va., by M. L. Royster, Supt. of said farm, under order of W. K. Cunningham, Jr., Supt. of Virginia State Penitentiary, by reason of an illegal conviction and sentence resulting from a trial held in such a manner as to deny petitioner his rights under the Fourteenth Amendment to the Constitution of the United States which guarantees all persons due process of law and equal protection of the laws. Petitioner therefore prays that this Honorable Court will grant the Writ of Habeas Corpus herein requested.

[fol. 4] • • • •

[fol. 5] STATEMENT OF FACTS

1. Petitioner was tried on a charge of Larceny of Automobile in the Circuit Court of Chesterfield County, Virginia on the 8th day of July 1946, and upon entering an unassisted plea of guilty was convicted and sentenced to serve eighteen (18) months in the Virginia State Penitentiary. This was petitioners first felony conviction.

2. Petitioner was tried in the Richmond City Circuit Court on November 18, 1953 and sentenced to serve an additional ten (10) years as a repeater for having been three times convicted and sentenced to the Virginia State Penitentiary.

3. Petitioner was granted a writ of habeas corpus in November 1957. In the petition for writ of habeas corpus petitioner had attacked the validity of the above 1946 conviction on the grounds that he had been denied due process of law which is guaranteed to everyone under the Fourteenth Amendment to the Constitution of the United States. After two hearings being held on the above writ of habeas corpus (the first hearing was continued on motion of Attorney for Respondent when the presiding Judge made the statement that he thought the trial being contested was void) petitioner's petition was denied and dismissed August 27, 1959.

4. On December 23, 1959 petitioner filed a petition for a writ of habeas corpus with the Supreme Court of Appeals of Virginia, citing the same allegations as the petition in Circuit Court had contained. This petition was dismissed on April 20, 1960.

5. On May 6, 1960 petitioner filed a petition for writ of Certiorari with the United States Supreme Court. This petition was denied November 7, 1960.

6. Since petitioner has alleged a denial of Constitutional rights under the Fourteenth Amendment to the Constitution of the United States, this Court has jurisdiction to review and reverse the foregoing decisions.

7. Petitioner alleges that since the sentence received in Chesterfield County Circuit Court on July 8, 1946 is illegal, null and void, the ten (10) year sentence imposed in Richmond City Circuit Court, resting upon the aforesaid illegal sentence, is also null and void.

[fol. 6] PETITIONER'S ARGUMENT

Petitioner was tried in 1946 without the aid of counsel, without being offered the services of counsel and without being informed that he was entitled to such services. He at no time, orally or in writing, waived this right, in fact he was not even aware that the Court could appoint counsel to defend him and being only 20 years old and a private in the United States Army with no financial resources he could not afford to obtain counsel of his own choosing.

It has been argued by Counsel for Respondent that even though petitioner had no counsel, he was still given a fair trial. The very fact that petitioner was tried without counsel and without his having waived his constitutional right to same and *without the Court informing him of this right* constitutes an unfair trial. Honorable Justice Black of the United States Supreme Court said in an opinion in the case of *Herman* vs. *Claudy*, 350 U.S. 116 (1956) rendered on January 9, 1956: "Herman should have been told by the County Court of his right to a defense lawyer." It would appear to petitioner from these words that the Court had an obligation to inform the defendant of his right to Counsel. Counsel for Respondent has stated the Court did not deny petitioner to the right to counsel, this is true but the *Court failed to inform petitioner of this right* and therefore effectively deprived him of the opportunity to take advantage of this right. A defendant cannot take advantage of any right that he is unaware even exists.

Counsel for Respondent has argued to back up his contentions that petitioner had a "fair trial" is the fact that petitioner only received an eighteen months sentence when he could have received a maximum of ten years. This is the same as saying that anyone charged with a crime who did not receive the maximum punishment provided by law had automatically received a "fair trial" as evidenced by his receiving less than the maximum sentence, even though he may be entirely innocent of the crime he is charged with.

As shown by exhibit (F), petitioner was also denied equal protection of the laws, which is guaranteed every-

one under the Fourteenth Amendment to the Constitution of the United States, said amendment being ratified by the State of Virginia October 8, 1869. As can be seen from this certified court order, the Circuit Court of Princess Anne County, Virginia held that Samuel I. Forsythe was denied due process of law at his trial of September 5, 1945 because the Court did not appoint him counsel and he had not waived this right. This decision was allowed [fol. 7] to stand without being appealed by the State, and yet when petitioner presented identical allegations, with proofs of such allegations, his claims are denied with the statement that he was not denied due process of law. This certainly is not equal protection of the laws.

Petitioner also contends that the Supreme Court of Appeals of Virginia could not have given him full consideration on his petition, as the state had removed part of the transcript taken at the hearing held in Chesterfield Circuit Court before submitting it to the said Court in answer to petitioner's petition. Petitioner has never received a full copy of this transcript and therefore could not submit it in his own behalf.

The excerpts submitted by the Attorney for Respondent contained only testimony favorable to Respondents cause thereby prejudicing petitioner's chances for a full and favorable hearing by the Supreme Court of Appeals of Virginia. Petitioner protested against the filing of only part of the transcript without submitting it in whole. This protest was ignored by the Supreme Court of Appeals of Virginia. How was it possible for them to reach a fair and just decision when they were only confronted with testimony favorable to Respondent? Petitioner cites this contention in anticipation of the Respondent arguing that this Court need not consider this petition under the decision of *Lee* v. *Smyth*, 262 F. 2d 53, 54 (1958). As Justice Sobeloff said in the case of *Holly* v. *Smyth* (decided June 3, 1960 in the U.S. Court of Appeals for the Fourth Circuit) "If the rule were read as broadly as the State suggests, it would mean that a Federal Court would practically never consider habeas corpus petitions from state prisoners. moreover, the rule of *Brown* v. *Allen*, 344 U.S. 443, 465 (1953) relates only to the necessity for

factual inquiries; it in no way relaxes the duty of the District Court to make its own Constitutional determination." The case of *Stonebreaker* v. *Smyth*, 163 F. 2d 498, 502 (4th Cir., 1947) was also cited by Justice Sobeloff in the above case as being an excellent opinion involving an inexperienced 20 year old youth.

The above *Brown* v. *Allen* rule requires the state courts to give full and fair consideration to petitions before it is applicable. Petitioner contends that this rule was not met by the State Supreme Court of Appeals when it reached a decision on his petition after reviewing only the portions of the lower Court transcript that were favorable to Respondent, without having the full transcript for its consideration.

[fol. 8] In answer to each petition filed by petitioner, Counsel for Respondent has included petitioner's criminal record stating that it was for "informational purposes". What possible informational purposes can a criminal record, that has occurred since the trial being contested took place, serve except to tend to prejudice the Court against petitioner?

Counsel for Respondent has alleged that petitioner had prior criminal experience and therefore did not need a lawyer, yet the above referred to records refute this allegation and show that petitioner had never been in a Court of Record before the contested 1946 trial.

Counsel for Respondent has alleged that petitioner was familiar with legal procedure because he had appeared in juvenile court at the age of 14 years. As anyone who has any knowledge of Courts is aware, juvenile proceedings are in no way similar to the proceedings in a Court of Record.

At the time of petitioner's trial in 1946 he was charged by the State with two (2) counts of Auto theft and by the Federal Courts with one (1) charge of inter-state transportation of a stolen automobile. At a conference held just prior to the trial, at the request of the prosecuting attorney, with an F. B. I. Agent, the aforesaid prosecuting attorney and petitioner present, it was agreed that petitioner would plead guilty to the state charges and the Federal charges would be dropped. At no time before,

during or after this conference did petitioner have the advice of an attorney. Petitioner alleges this was a form of coercion by the Prosecuting Attorney to obtain a guilty plea.

Petitioner was tried for Larceny of Automobile, which was a felony. In 1946 Virginia had a statute (Va. Code 1919 Sec. 4480—1950 Sec. 18-236)* dealing with unauthorized use of an auto which was only a misdemeanor. Petitioner cites this and alleges that an attorney in his behalf could possibly have brought out facts at his trial making this statute more applicable to petitioner than the more serious one of larceny of auto.

The U. S. Supreme Court ruled on January 9, 1956 that [fol. 9] persons incarcerated in flagrant violation of their constitutional rights have a remedy. Petitioner does not have a transcript of this opinion but can quote from the newspaper article which appeared in the Richmond News Leader, Richmond, Va., on January 10, 1956.

> "The Supreme Court says persons sentenced to state prisons in "flagrant violation" of their constitutional rights may challange their convictions regardless of the passage of years.
>
> The High Tribunal ruled unanimously yesterday that a Penn. prisoner sentenced 10 years ago on burglary, larceny and forgery charges is now entitled to a habeas corpus hearing on his complaint of violation of constitutional rights. The ruling was in favor of Stephen J. Herman, who was sentenced to 17½ to 35 years imprisonment by a Washington County, Pa. court after he pleaded guilty to the charges.

---

* Va Code Sec. 4480 (1919) 18-236 (1950)—UNAUTHORIZED USE OF AUTOMOBILES OR OTHER MOTOR VEHICLES: Any person who, without the consent of the owner, shall take, or cause to be taken, an automobile, or motor vehicle, and operate or drive, or cause same to be operated or driven for his own private use or purpose, shall be deemed guilty of a misdemeanor.

HERMAN'S COMPLAINT

Herman's complaint was that he was not told of his right to have a lawyer defend him in the County Court.

Justice Black, author of the Supreme Court's opinion, said Herman should have been told by the County Court of his right to a defense lawyer. Black added that the number and complexity of the charges against Herman "create the strong conviction that no layman could have understood the accusation".

"Nor was Herman barred from presenting his challange to the conviction because eight years had passed before the action was commenced", Black stated. He also said "men incarcerated in flagrant violation of their constitutional rights have a remedy".

In ordering the habeas corpus hearing in the County Court, Black said that if Herman can now prove his charges of violation of constitutional rights he will be entitled to "relief". This could mean Herman's release from prison.

The foregoing is a word for word duplication as it appeared in the newspaper, with quotations and punctuations as they appeared.

In *DeMeerleer* v. *Michigan*, 329 U.S. 663 (1947) the Court gave a concluding summary at page 665. "Here a seventeen-year-old defendant, confronted by a serious and complicated criminal charge, was hurried through unfamiliar legal proceedings without a word being said in his defense. At no time was assistance of counsel offered or mentioned to him, nor was he appraised of the consequences of his plea. Under the holdings of this Court, petitioner was deprived of rights essential to a fair hearing under the Federal Constitution".

Counsel for Respondent has stated that the records of the Supreme Court of Appeals of Virginia do not disclose that petitioner made any attempt to perfect an appeal to that Court from the decision handed down in Chesterfield County Circuit Court. As shown by exhibit (G) petitioner was informed by the Clerk of Court of

Chesterfield County that it would be necessary for petitioner to pay a fee of ten (10) dollars before an appeal could be effected from that Court. As Respondent is aware, petitioner has had to file a paupers oath asking permission of the various Courts to file his petitions in [fol. 10] Forma Pauperis, therefore, he is also aware that it was impossible for petitioner to perfect an appeal from the decision of the Chesterfield County Court. Petitioner proved to the Supreme Court of Appeals of Virginia that he could not perfect the above mentioned appeal and was forced to petition for a habeas corpus which was accepted by said Court. It would have been to petitioner's best interests had he been able to perfect said appeal as the Supreme Court of Appeals would then have had the full transcript to consider in reaching its decision instead of the carefully edited excerpts as submitted by Counsel for Respondent.

Petitioner has had to draw up all necessary papers to the best of his ability without the aid of an attorney, he therefore respectfully requests this Court to accept this petition in the manner and form in which it is drawn.

In view of the facts set forth in this petition and the allegations backed by Court decisions heretofore cited, this Honorable Court is requested in the name of Justice to grant petitioner a writ of Habeas Corpus in order that this Court may determine whether or not petitioner should have and is entitled to the relief denied him by the State Courts.

I will forever pray:

Respectfully submitted this 5th day of December 1960.

/s/ John R. Jones
JOHN R. JONES
Petitioner

Duly Sworn to by John R. Jones
Jurat Omitted in Printing

[fols. 11-43] * * * *

[fol. 44] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND, VIRGINIA

[Title omitted]

RETURN—Filed March 1, 1961

Now comes the respondent, by counsel, and, in conformity with the order of this Court of February 2, 1961, files this Return and says:

1. The petitioner is presently detained pursuant to a judgment of the Circuit Court of the City of Richmond of November 18, 1953, wherein petitioner was ordered to serve an additional term of ten years in the penitentiary as a third time offender. (See Exhibit I—Certificate of Curtis R. Mann, Director, Bureau of Records and Criminal Identification).

2. Petitioner's 1946 conviction in the Circuit Court of Chesterfield County on a charge of larceny of an automobile forms part of the basis for the petitioner's recidivist conviction of November 18, 1953.

3. Petitioner was not represented at his trial on July 8, 1946, at which time he plead guilty to a charge of larceny of an automobile, which is a non-capital felony.

4. Petitioner was accorded a hearing in the Circuit Court of Chesterfield County, Virginia on February 28, 1958 (A copy of the transcript of that proceeding is attached hereto and marked Exhibit II).

[fol. 45] 5. His petition was dismissed on August 27, 1958, (see Exhibit III—Certified Copy of Court Order).

6. The fact that petitioner was not represented by an attorney at his 1946 trial on an uncomplicated, non-capital charge does not of itself constitute "special circumstances" or a denial of constitutional rights. Petitioner had had previous court experience prior to 1946.

7. An examination of the transcript of the habeas corpus hearing in the said court reveals that petitioner was not denied any of his constitutional rights at his trial on July 8, 1946.

8. Petitioner has failed to show that any of his constitutional rights were denied him at his trial in the Circuit Court of Chesterfield County on July 8, 1946.

WHEREFORE, respondent prays that the petition for a writ of habeas corpus be dismissed.

W. K. CUNNINGHAM, JR., Superintendent
of the Virginia State Penitentiary

By: /s/ Reno S. Harp, III
Counsel

Reno S. Harp, III
Assistant Attorney General
Supreme Court—State Library Building
Richmond 19, Virginia

Duly Sworn to by Reno S. Harp, III
Jurat Omitted in Printing

[fols. 46-80] * * * *

[fol. 81] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Title omitted]

ORDER DIRECTING FILING OF PETITION AND RETURN—
Feb. 2, 1961

Petitioner having filed an application for writ of habeas corpus, accompanied by an affidavit of poverty as provided by law, it is

ORDERED that said petition for writ of habeas corpus be filed without requiring said petitioner to pay the fees as prescribed by law or giving security therefor.

It is further ORDERED that said application for writ of habeas corpus be entertained by this Court, and the respondent, W. K. Cunningham, Jr., Superintendent of the Virginia State Penitentiary, do make return indicating under what lawful authority said petitioner is now being held in custody, and it is further

ORDERED that upon the filing of said return on or before March 1, 1961, the Court will then determine whether a plenary hearing is necessary to ascertain the legality of petitioner's detention. Brown v. Allen, 344 U.S. 443, 460, 461. Without limiting the nature of the return so filed, the Court is essentially interested in the following issues: [fol. 82] (1) Was petitioner represented by counsel or did he intelligently waive such right to counsel?

(2) If petitioner was not represented by counsel, did petitioner have a right to counsel under the "special circumstances" doctrine of youthful defendants, without previous experience in criminal cases, faced with complex legal issues? Wade v. Mayo, 334 U.S. 672; Holly v. Smyth, 280 F. 2d. 536.

(3) Was the petitioner ever accorded a plenary hearing by any state or federal court on his application for relief by way of habeas corpus?

Respondent is directed to file copies of any pertinent court records relating to the above questions.

The Court is not interested in petitioner's contention, based on the allegation that "it was agreed that petitioner would plead guilty to the state charges and the federal charges would be dropped", that his plea of guilty was coerced.

The Clerk of this Court will mail certified copies of this order to the petitioner and to the Attorney General of Virginia.

/s/ Oren E. Lewis

United States District Judge

Richmond, Virginia

February 2, 1961

[fol. 83] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

C.A. 3236-M

JOHN R. JONES

v.

W. K. CUNNINGHAM, JR., Superintendent of the Virginia State Penitentiary

ORDER AND OPINION—March 29, 1961

A petition for writ of habeas corpus, by John R. Jones, was filed, in forma pauperis, with this Court. Respondent has filed an answer, with exhibits attached thereto, as required by order of the Court.

On July 8, 1946, petitioner was convicted on his plea of guilty and was given a sentence of eighteen months by the Circuit Court of Chesterfield County, Virginia, on a charge of larceny of an automobile. On November 18, 1953, petitioner, as a third time offender, was given a ten year sentence under the recidivist statute, by the Circuit Court of the City of Richmond, Virginia. Petitioner is now in custody under authority of this sentence.

In attacking the validity of this sentence, petitioner contends that the 1946 conviction is void and, therefore, the present sentence is void. Petitioner alleges that at the 1946 trial he was not represented by counsel, that he did not waive counsel, that the Court did not inquire if he wanted counsel. Petitioner contends that because he was not represented by counsel, nor informed of his right to have counsel, he was denied due process of law under [fol. 84] the Fourteenth Amendment to the Federal Constitution and, therefore, the 1946 conviction is void.

It appears to the Court that petitioner alleged the same contentions in a petition for writ of habeas corpus filed in the state court. Petitioner was afforded a plenary

hearing by the Circuit Court of Chesterfield County, Virginia, on February 28, 1958. It is clear from a reading of the transcript of the hearing that the same issues raised in the petition pending before this Court were raised at that hearing and were determined by order of the Circuit Court of Chesterfield County, Virginia, entered August 27, 1959. Another petition for writ of habeas corpus, alleging the same contentions, was denied by the Supreme Court of Appeals of Virginia and petition for writ of certiorari was denied by the Supreme Court of the United States. The state court having considered petitioner's same allegations and having determined the factual and legal issues, it is not necessary for this Court to consider petitioner's petition for writ of habeas corpus. Brown v. Allen, 344 U.S. 443 (1953); Lee v. Smyth, 262 F. 2d 53 (4 Cir. 1958); Holly v. Smyth, 280 F. 2d 536 (4 Cir. 1960).

It further appears to the Court that petitioner has failed to show that special circumstances, necessitating his representation by counsel, were present at his trial on a noncapital offense in 1946. Betts v. Brady, 316 U.S. 455 (1942); Lee v. Smyth, 262 F. 2d 53 (4 Cir. 1958); Holly v. Smyth, 280 F. 2d 536 (4 Cir. 1960).

It also appears to the Court that petitioner's allegations relating to a coerced plea of guilty are insufficient.

[fol. 85] It is, therefore, ORDERED that the prayer of the petition for writ of habeas corpus be and the same is hereby denied, and the said petition be and the same is hereby dismissed.

The Clerk is directed to mail certified copies of this order to the petitioner, the respondent and the Attorney General of Virginia.

/s/ Oren E. Lewis

United States District Judge

Richmond, Virginia
March 29, 1961

[fol. 86] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND, VIRGINIA

[Title omitted]

NOTICE OF APPEAL—Filed April 5, 1961

To the Honorable United States District Judge
Oren E. Lewis:

Please be advised that I wish to appeal the decision of Your Court in the above styled case, dated March 29, 1961, to the U.S. Court of Appeals for the Fourth Circuit. I hereby attest that I am a citizen of the United States and make this request under Title 28, U.S. Code Section 1915. Attached hereto is a Forma Pauperis oath under which I request this appeal be allowed to proceed. I respectfully request Your Honor to grant a Certificate of Probable Cause as provided under 28 U.S.C.A. 2253.

The grounds for this request are based on the following facts:

1. Petitioner was not provided a full and fair consideration of his allegations in the Supreme Court of Appeals of Virginia. The said Court reached its decision without having the full transcript of the lower Court proceedings before it, even worse, their decision was reached when they were aware that they only had a carefully edited portion of this transcript as submitted by Respondent. Even if the parts of the transcript that were removed by the Attorney for Respondent, before submitting it to the Court, were not of a nature as to be a deciding factor in reaching a decision, petitioner contends his rights were prejudiced by the said Court not demanding a full and complete transcript. They have never seen a full copy of the transcript so how could they determine whether the missing pages were important to the issue or not? [fol. 87] 2. Petitioner was inexperienced in criminal procedure and was not advised of his right to Counsel. Petitioner was 20 years old at the time of the contested

trial and without the aid of counsel. *Herman* v. *Claudy*, 350 U.S. 116 (1956) cites a similar trial involving a 21 year old defendant. Had petitioner been accorded his right to the aid of counsel; counsel might have been successful in getting the felony charges reduced to Unauthorized Use of an Automobile which would have fit the circumstances of the case much better.

Respectfully submitted this 4th day of April 1961.

/s/ John R. Jones
JOHN R. JONES
Petitioner

FORMA PAUPERIS PETITION

STATE OF VIRGINIA)
COUNTY OF GOOCHLAND) To-wit:—

This is to certify that I, John R. Jones, the undersigned, am destitute and without funds to pay the costs of this action; that I own no property, personal or real. It is respectfully requested that I be permitted to prosecute this action in Forma Pauperis as provided under Title 28, Section 1915 of the U.S. Code. The amount of money in my spend account at the Virginia State Penitentiary Farm is 55c.

/s/ John R. Jones
JOHN R. JONES
Petitioner

Subscribed and sworn to before me, a Notary Public in and for the County of Goochland and State of Virginia this 4th day of April 1961.

My commission expires: June 17, 1964.

/s/ R. M. Oliver
R. M. OLIVER
Notary Public

[fol. 88] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Title omitted]

ORDER DENYING LEAVE TO PROCEED IN FORMA PAUPERIS AND FOR A CERTIFICATE OF PROBABLE CAUSE—April 6, 1961

Upon consideration of petitioner's notice of appeal, filed April 5, 1961, to the order of this Court entered March 29, 1961, denying petitioner's petition for writ of habeas corpus, and petitioner's motion to proceed in forma pauperis in perfecting his appeal to the United States Court of Appeals for the Fourth Circuit; it is

ORDERED that the motion to proceed in forma pauperis be, and the same is hereby, denied.

The Court being of the opinion that no substantial question is presented for appeal, it is further

ORDERED that the certificate of probable cause, required for appeal under Title 28, U.S.C., Section 2253, be, and it hereby is, denied.

The Clerk of this Court is directed to mail copies of this order to the petitioner, the respondent, and the Attorney General for the State of Virginia.

/s/ Oren E. Lewis
United States District Judge

Richmond, Virginia
April 6, 1961

[fols. 89-91] * * * *

[fol. 92] PROCEEDINGS

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8356

JOHN R. JONES, APPELLANT

versus

W. K. CUNNINGHAM, JR., Superintendent of Virginia State Penitentiary, APPELLEE

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond

DOCKET ENTRIES

April 14, 1961, record on appeal filed and appeal docketed.

April 14, 1961, forma pauperis petition filed.

April 14, 1961, order granting certificate of probable cause, and granting appellant leave to proceed in forma pauperis, filed.

April 14, 1961, order assigning F. D. G. Ribble and Daniel J. Meador as counsel to present the appeal of John R. Jones, fixing time for filing of briefs and appendices, and directing Clerk to transmit the record on appeal to counsel for the appellant, filed.

Memo. of Clerk: Copies of these papers follow:

[fols. 93-96] * * * *

[fol. 97] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Title omitted]

To: F. D. G. Ribble
Daniel J. Meador
Counsel for the Appellant

NOTICE OF MOTION TO DISMISS—Filed June 22, 1961

Please take notice that on June 22, 1961, the Appellee, by counsel, in conformity with his letter to counsel for the Appellant of June 16, 1961, will file the original of the attached Motion to Dismiss in the Clerk's Office of the United States Court of Appeals for the Fourth Circuit at Asheville, North Carolina, and will move for the dismissal of the appeal when this case is called for argument.

W. K. CUNNINGHAM, JR., Superintendent
of the Virginia State Penitentiary

By: Reno S. Harp, III
Counsel

Reno S. Harp, III
Assistant Attorney General
Supreme Court Building
Richmond 19, Virginia

CERTIFICATE

I certify that I delievered a copy of the foregoing Notice to counsel of record for the Appellant herein on this the 22d day of June, 1961.

Reno S. Harp, III
RENO S. HARP, III
Assistant Attorney General

[fol. 98] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Title omitted]

MOTION TO DISMISS—Filed June 22, 1961

Now comes the appellee, by counsel, and moves the Court to dismiss this appeal for the following reasons:

1. John R. Jones, the appellant herein, has accepted the terms of parole as specified in a parole agreement signed by him, a photostatic copy of which is attached hereto and marked Exhibit I.

2. John R. Jones, the appellant herein, will be released from custody on June 26, 1961, and will go to Lafayette, Georgia, where he will live with his Aunt and Uncle. He will be supervised by the Georgia Parole authorities in conformity with the Uniform Act for Out-of-State Parolee Supervision.

3. After June 26, 1961, the appellee herein, W. K. Cunningham, Jr., Superintendent of the Virginia State Penitentiary, will exercise absolutely no control over the appellant, John R. Jones, for the reason that the appellant will no longer be in the custody of the appellee.

4. This Court will be without jurisdiction to adjudicate this case after June 26, 1961, for the reason that the appellant will no longer be in the custody of the appellee, and the cause will then be moot.

[fol. 99] Wherefore, appellee prays that this appeal be dismissed from the docket of this Court.

W. K. CUNNINGHAM, JR., Superintendent
of the Virginia State Penitentiary

By: Reno S. Harp, III
Counsel

Reno S. Harp, III
Assistant Attorney General
Supreme Court Building
Richmond 19, Virginia

CERTIFICATE OF SERVICE (Omitted in Printing)

[fol. 100] EXHIBIT "1" TO MOTION

VIRGINIA PAROLE BOARD

ORDER OF RELEASE AND CONDITIONS OF PAROLE

To John R. Jones, No. 62545

In accordance with Title 53, Chapter 11, Code of Virginia, you have been granted parole, subject to the following parole conditions, and if accepted, your release from State Farm is directed on June 26, 1961.

You are placed under the custody and control of the Virginia Parole Board. The Parole Board may at any time extend your period of parole. YOU WILL REMAIN UNDER SUPERVISION UNTIL YOU RECEIVE THE FINAL ORDER OF DISCHARGE FROM THE PAROLE BOARD.

Your minimum date of release from supervision is March 30, 1964.

It is the order of the Parole Board that you shall comply with the following general and special conditions of parole. The general conditions are as follows: (a) Refrain from the violation of any penal laws and ordinances. (b) Live a clean, honest, and temperate life. (c) Keep good company and good hours. (d) Keep away from all undesirable places. (e) Work regularly. When out of work, notify your Parole Officer at once. (f) Do not leave or remain away from the community where you reside without permission of your Parole Officer. You shall not change your residence without the permission of your Parole Officer. (g) Contribute regularly to the support of those for whose support you are legally responsible. (h) You shall not own or operate a motor vehicle until you have received the written permission of your Parole Officer. (i) You shall not be permitted to own or have in your possession any legal firearms at any time while on parole, except with the written permission of your Parole Officer. (j) Submit in writing, once a month, a report on forms as prescribed by the Parole Board unless excused by your Officer. (k) Permit your Parole Officer to visit

your home and place of employment at any time. (1) Follow the Parole Officer's instructions and advice. The law gives him authority to instruct and advise you regarding your activities.

The special conditions ordered by the Parole Board are:

Home: Mr. and Mrs. J. N. McKinney, 701 McLemore Street, LaFayette, Georgia (Uncle and Aunt)
Employment: Mr. J. N. McKinney, 701 McLemore Street, LaFayette, Georgia (Plumber)

You are hereby advised that under the law the Parole Board may at any time revoke or modify any conditions of this parole. You shall be subject to arrest, for cause, upon order of the Parole Board or without order, for cause, by the Parole Officer. At any time within the period of your parole or within the maximum period for which you might originally have been sentenced for the offense for which you were convicted, the Parole Board may, if it sees fit, for cause, have you returned to the institution from which you were released to serve the unserved portion of your sentence of any part thereof.

You will proceed immediately upon your release by the most direct route and report as follows:

In person to Mr. Frank Clayton, Parole Supervisor, Chatsworth, Georgia.

The Parole Board has released you on parole because it believes that you will be sincere in your efforts to live up to the above conditions and thus benefit yourself as well as the community.

BY DIRECTION OF THE VIRGINIA PAROLE BOARD

/s/ R. E. Wilkins
Member, Virginia Parole Board

I agree that in the event I am arrested in any state or jurisdiction of the United States or any of its possessions for violation of this parole or for the commission of another offense, I will waive extradition and will return voluntarily to the state of Virginia.

I have read and/or had explained to me the above and by signature or mark below acknowledge receipt of this parole and agree to the conditions set forth.

/s/ John R. Jones
Parolee

Copies: Parolee, Parole Officer, Parole Board, Institution

[fol. 101]

IN THE UNITED STATES COURT OF APPEALS

DOCKET ENTRIES

June 23, 1961, (June Term, 1961) cause came on to be heard on the motion of appellee to dismiss and on the merits before Sobeloff, Chief Judge, and Haynsworth and Boreman, Circuit Judges, and was argued by counsel and submitted.

June 30, 1961, memorandum of law on behalf of appellee filed.

July 3, 1961, memorandum for appellant in opposition to appellee's motion to dismiss filed.

July 3, 1961, motion of appellant to add parties respondent filed.

July 7, 1961, reply memorandum of law on behalf of appellee filed.

Memo. of Clerk: The motion to add parties respondent follows:

[fol. 102] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Title omitted]

MOTION TO ADD PARTIES RESPONDENT—Filed July 3, 1961

1. Appellee moves the court for an order making parties respondent to the petition for habeas corpus and appellees in this case the following persons, members of the Virginia Parole Board:

Charles P. Chew
Ralph E. Wilkins
James W. Phillips

The address of each is 429 S. Belvidere Street, Richmond 20, Virginia.

2. By virtue of an order of the Virginia Parole Board effective June 26, 1961, the above named persons, constituting the Virginia Parole Board, now have custody of the appellant John R. Jones.

F. D. G. Ribble
Daniel J. Meador
Counsel for Appellant

CERTIFICATE OF SERVICE (Omitted in Printing)

[fol. 103]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8356

JOHN R. JONES, APPELLANT

versus

W. K. CUNNINGHAM, JR., Superintendent of Virginia State Penitentiary, APPELLEE

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond
OREN R. LEWIS, District Judge

OPINION—Sept. 14, 1961

(Argued June 23, 1961)

Before SOBELOFF, Chief Judge, and HAYNSWORTH and BOREMAN, Circuit Judges.

F. D. G. Ribble and Daniel J. Meador (court-assigned counsel) for Appellant, and Reno S. Harp, III, Assistant Attorney General of Virginia, (Frederick T. Gray, Attorney General of Virginia, on brief) for Appellee.

[fol. 104] HAYNSWORTH, Circuit Judge:

This petition for a writ of habeas corpus must be dismissed, for the prisoner is now at large on parole. He is no longer in the custody of the defendant, the Superintendent of the Virginia State Penitentiary, where he had been confined. While indirectly under their supervision, he is not in the physical custody of the members of the Virginia Parole Board, whom the petitioner would substitute as parties defendant, nor of any of their subordinates.

Jones, serving a sentence as a recidivist in Virginia sought his release by attacking one of the underlying convictions. The underlying conviction was imposed upon

a plea of guilty, but Jones alleges that he was without the assistance of counsel and was not told of and did not know that he had any right to counsel.

After exhaustion of his state remedies, Jones sought a writ of habeas corpus in the District Court. On appeal from a denial of his petition there, we appointed distinguished counsel to represent him.[1] They have ably presented his contentions, (1) that there were special circumstances which made his conviction without the assistance of counsel fundamentally unfair within the rule of Betts v. Brady, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595, and (2) if the circumstances were not special, nevertheless, either Betts v. Brady has been overruled by Griffin v. Illinois, 351 U.S. 12, or that this court should anticipate the possibility that the Supreme Court, given an appropriate occasion, will overrule Betts v. Brady.

[fol. 105] In the meanwhile, Jones became eligible for parole. He signed a parole agreement which provided that he would reside with an uncle and aunt in LaFayette, Georgia, be employed by the uncle as a plumber and report promptly after his release to a Georgia Parole Supervisor at Chatsworth, Georgia.[2] He was then released. It is assumed that he then left Virginia and is now living and working in Georgia.

In the nature of things, the "Great Writ" of *habeas corpus ad subjiciendum* may issue only when the applicant is in the actual, physical custody of the person to whom the writ is directed.[3] The court may not order one to produce the body of another who is at liberty and whose arrest would be unlawful. The great purpose of the writ is to afford a means for speedily testing the legality of a present, physical detention of a person. It serves no other purpose.[4]

---

[1] The Dean of the Law School of the University of Virginia and another member of the faculty of that school.

[2] Supervision by parole officials of Georgia had been arranged under the provisions of the Uniform Act for Out-of-State Parolee Supervision.

[3] See, generally, III Blackstone's Commentaries, 129, et seq. (1 Ed. 1768).

[4] See Heflin v. United States, 358 U.S. 415, 421, 79 S. Ct. 451, 3 L.Ed. 2d 407 (concurring opinion).

It was in recognition of the nature of the writ and its limitations that the Supreme Court held the writ unavailable to a Naval officer under orders to confine himself to the City of Washington[5] or to persons charged with crime, but at large on bail,[6] or to one confined in [fol. 106] prison under a sentence other than the one he seeks to attack.[7] It thus appears that some restraint upon a person's liberty is not necessarily the equivalent of the physical detention which is a requisite of the writ.

The Supreme Court has considered a case identical to that before us. In Weber v. Squier, 315 U.S. 810, 62 S.Ct. 800, 86 L.Ed. 1209, a petition for a writ of certiorari by an applicant for habeas corpus was denied on the stated ground that the cause was moot, the petitioner having been paroled and being no longer in the warden's custody.

Our inquiry would end with Weber v. Squier were it not for the fact that the question, though never since precisely before the Supreme Court, has a subsequent history in that court which brings into focus the question presented by the motion before us to substitute as parties defendant the members of Virginia's Parole Board.

In Pollard v. United States, 352 U.S. 354, 77 S.Ct. 481, 1 L.Ed. 2d 393, the Supreme Court said that a proceeding under 28 USCA § 2255 was not rendered moot by the expiration of the term of the sentence and the fact the petitioner, at the time of the hearing, was unconditionally at large. In saying so, it referred in summary fashion to the earlier cases of Fiswick v. United States, 329 U.S. 211, 67 S.Ct. 224, 91 L.Ed. 196, and United States v. Morgan, 346 U.S. 502, 74 S.Ct. 247, 98 L.Ed. 248, though in the proceedings involved in those cases there was no custody requirement.

Fiswick, an alien, sought to overturn his conviction by a direct appeal. It was that proceeding which came

---

[5] Wales v. Whitney, 114 U.S. 564, 5 S.Ct. 1050, 29 L.Ed. 277.

[6] Johnson v. Hoy, 227 U.S. 245, 33 S.Ct. 240, 57 L.Ed. 497; Stallings v. Splain, 253 U.S. 339, 40 S.Ct. 537, 64 L.Ed. 940.

[7] McNally v. Hill, 293 U.S. 131, 55 S.Ct. 24, 79 L.Ed. 238; Heflin v. United States, 358 U.S. 415, 79 S.Ct. 451, 3 L.Ed. 2d 407.

[fol. 107] before the Supreme Court on certiorari. Meanwhile, he fully served his term and was released. It was held that the cause was not rendered moot because the conviction subjected him to deportation in the event the crime was found to be one involving moral turpitude.

Such proceedings on direct review of a conviction were never thought to involve the custody requirements of habeas corpus.

Morgan received in a state court a longer sentence than otherwise would have been imposed because of an earlier federal sentence which had been fully served. He sought a writ of *coram nobis* to review the federal court conviction. A majority of the court held that writ available under those circumstances. The decision in Morgan supports the conclusion that the custody requirement implicit in habeas corpus is not essential in coram nobis, but it does not suggest that the custody requirement may be disregarded in habeas corpus or in a proceeding under § 2255.

In Pollard, there was no reference to the custody requirement of § 2255 which, by its terms, is made available to a "prisoner in custody under sentence * * * claiming the right to be released * * *." The brief reference to the Fiswick and Morgan cases suggests the court then thought a § 2255 proceeding comparable in these respects to direct review and coram nobis proceedings.

Of course if Pollard is authoritative, if a former federal prisoner whose term is fully served can obtain review of his conviction under § 2255, a parolee whose term has not yet expired is entitled to the same relief. The Court of Appeals for the Ninth Circuit, relying on Pollard, so held [fol. 108] in two cases.[*] Indeed, that court allowed habeas corpus, for it recognized no difference in the custody requirement of habeas corpus and § 2255.

The Supreme Court then decided Heflin v. United States, 358 U.S. 415, 79 S.Ct. 451, 3 L.Ed. 2d 407, in which it held the custody requirement of § 2255 comparable to that of habeas corpus. A prisoner serving the first of three

[*] Dickson v. Castle, 9 Cir., 244 F.2d 665; Egan v. Teets, 9 Cir., 251 F.2d 571.

consecutive sentences was held to be without standing to question, under § 2255, the legality of the third sentence which he had not then begun to serve. The Court followed its earlier decision in a habeas corpus case involving similar circumstances. McNally v. Hill, 293 U.S. 131, 55 S.Ct. 24, 79 L.Ed. 238.

The situation was clarified and Pollard laid to rest by Parker v. Ellis, 362 U.S. 574, 80 S.Ct. 909, 4 L.Ed. 2d 963. Parker fully served the term of his Texas sentence while fruitlessly seeking in state and federal courts a hearing on his contention that the sentence was illegal. A majority of the court, per curiam, dismissed the habeas corpus case on the ground that Parker's release made it moot. It explained Pollard as having gone off upon an "unconsidered assumption" that § 2255 relief was available to one not in custody contrary to the later decision, after full consideration, in Heflin. It relied upon and followed Weber v. Squier.

In his dissenting opinion, the Chief Justice recognized that this case was indistinguishable from Pollard. He thought Pollard and Heflin reconcilable, and he sought to explain Weber v. Squier on the limited ground that the [fol. 109] parolee was no longer in the custody of the warden, the only official then before the court, leaving open the question of whether the parolee was still in the custody of some other official.

Clearly, however, the majority in Parker v. Ellis did not accept the minority's explanation of Weber v. Squier. The majority did not expressly overrule Pollard, though the two cases seem plainly inconsistent, for it thought Pollard already overruled by Heflin.[9]

We, of course, must follow the majority in Parker v. Ellis. We accept Weber v. Squier, as it did, as meaning a parolee is not in such custody as is required for habeas corpus. We find nothing of substance left in Pollard in the light of the subsequent decisions in Heflin and Parker v. Ellis.

With the exception of the two cases in the Ninth Circuit following Pollard,[9] the Courts of Appeals have consist-

[9] See footnote 8, supra. In neither of those cases was it held that a parolee is in custody. In each, as in Pollard, the custody requirement was unmentioned.

ently held that a paroled state prisoner is not in such custody as to permit him to seek a writ of habeas corpus in the federal courts.[10] The Ninth Circuit, in the same year in which, relying upon Pollard, it decided Egan v. [fol. 110] Teets,[11] emphatically held in a different context that one on parole is not in custody.[12] Seven of the Courts of Appeals have reached that conclusion. There is no dissenter among them. All agree that, if custody is a requirement of the writ, a state parolee cannot qualify.

Of particular importance in this case, involving a Virginia parolee, is the decision of this court in Whiting v. Chew, 4 Cir., 273 F.2d 885. There, a Virginia parolee, confined in Ohio, sought a writ of habeas corpus directed to the Director of the Virginia Parole Board for the purpose of removing a detainer filed by the Virginia Parole Board with Ohio prison officials. We held habeas corpus unavailable because the petitioner was not in the actual or constructive custody of Virginia's parole official.

We adhere to that decision. This petitioner, living with his uncle in Georgia and working there is not in such custody of Virginia's parole or prison officials as to support a writ of habeas corpus directed to them.

One subsidiary question remains to be mentioned.

It is contended that the petitioner is in the custody of Virginia's Parole Board because Virginia's statute says he is. Section 53-264 of Virginia's code provides that its prison official shall release "into the custody of the Parole Board" any prisoner subject to parole when ordered to do so by the Parole Board. It is not clear that this is not a procedural provision to obtain the prisoner's release from all custody, but for present purposes we may assume that

---

[10] United States *ex rel.* St. John v. Cummings, 2 Cir., 233 F.2d 187; Adams v. Hiatt, 3 Cir., 173 F.2d 896; Whiting v. Chew, 4 Cir., 273 F.2d 885; Van Meter v. Sanford, 5 Cir., 99 F.2d 511; Siercovich v. McDonald, 5 Cir., 193 F.2d 118; Factor v. Fox, 6 Cir., 175 F.2d 626; Johnson v. Eckle, 6 Cir., 269 F.2d 836; Weber v. Hunter, 10 Cir., 137 F.2d 926.

[11] See Footnote 8, supra.

[12] Strand v. Schmittroth, 9 Cir., 251 F.2d 590.

[fol. 111] Virginia would interpret it to be comparable to the provisions of 18 USCA § 4203, applicable to Federal parolees.[13]

Addressing itself to a different problem, the Supreme Court said in Anderson v. Corall, 263 U.S. 193, 44 S.Ct. 43, 68 L.Ed. 247:

> "* * * The parole authorized by the statute does not suspend service or operate to shorten the term. While on parole the convict is bound to remain in the legal custody and under the control of the warden until the expiration of the term, less allowance, if any, for good conduct. While this is an amelioration of punishment, it is in legal effect imprisonment."

Thereafter, Judge Learned Hand said in a dictum,[14] "it is conceivable" that a federal parolee might have a right to have his conviction reviewed by habeas corpus because the statute said he was in custody. One such parol actually realized what Judge Hand thought conceivable. Because of the provisions of 18 USCA § 4203, the Court of Appeals for the Second Circuit held that the proceeding to review the conviction of a federal prisoner did not become moot when he was paroled.[15]

Respectfully, we disagree. It is not the labels a statute attaches but the substantive relationships it creates which are of importance. Whether or not Virginia's statute pro- [fol. 112] vides a hypothetical custody of her Parole Board, the fact is that the petitioner is lawfully at large in Georgia. From time to time, he must report to a Georgia parole officer and he should not change his residence or his employment without the prior or subsequent approval of that officer. Otherwise, he is as free as any other citizen to do as he pleases and go where he pleases.

---

[13] 18 USCA § 4203 provides that a federal parolee is "in the legal custody and under the control of the Attorney General, until the expiration of the maximum term or terms for which he was sentenced."

[14] United States v. Bradford, 2 Cir., 194 F.2d 197.

[15] United States v. Brilliant, 2 Cir., 274 F.2d 618.

His status is predominantly one of liberty. If he should commit a crime, his parole may be revoked, but any other citizen would be subject to arrest for the same offense. The overriding point is that Virginia's Parole Board cannot revoke his parole or compel his return to Virginia unless the parolee, himself, commits an act which would subject any citizen to arrest and confinement or ignores the other minimal terms of his parole.

Unquestionably, he is under some duty and restraint inapplicable to other citizens, but, as unquestionably, absent a violation of the terms of his parole, Virginia's Parole Board has neither the right nor the power to produce his body in the District Court for the Eastern District of Virginia. By his own volition, Jones could appear in the court in Virginia, and his consent is essential to the production of his body there.

To attach significance to a declaration of custody which, at best, is highly technical, hypothetical and insubstantial,[16] would prefer empty labels to a realistic appraisal of actualities. This we need not do. What formal declarations a state elects to incorporate in her statutes, if they do not affect substantive rights and relations, should not, and do not, control the availability of the writ of habeas corpus in [fol. 113] the federal courts. If the declaration creates a technical custody, it is not the kind of custody which is an essential of habeas corpus.

Since the petitioner is no longer in custody, this habeas corpus proceeding is moot.

Appeal dismissed.

SOBELOFF, Chief Judge, concurring:

The assumption that on completing a prison sentence, or being paroled, a person has no further interest to contest his record of conviction is contrary to common experience. Society, as our every-day observation confirms, visits upon such persons its strong disfavor, often involving hardship not less severe than imprisonment,

[16] See Van Meter v. Sanford, 5 Cir., 99 F.2d 511; Factor v. Fox, 6 Cir., 175 F.2d 626.

itself. Where the conviction was obtained by due process these collateral consequences, though unfortunate, cannot be redressed by law. But where constitutional rights have been violated there should be standing to attack a conviction even though the crime has been "paid for." Particularly is this true where the necessary steps for relief—technical, complicated and challenging to the most astute lawyers—are so time consuming that the prison term runs out before the process is completed.

The instant case, however, presents stronger grounds for allowing such attack than where "mere" social and economic prejudices will be brought to bear on an "ex-con." Here, not only is Jones still under some restriction, but he remains subject to recommitment to serve out his unexpired term in the event of parole violation, even if the breach is a minor one. This fact, it seems to me, makes our case logically indistinguishable on the issue of justiciability from *Fiswick* v. *United States*, 329 U.S. 211 (1946) [fol. 114] and, on the issue of standing to maintain a collateral attack, from *United States* v. *Morgan*, 346 U.S. 502 (1954) and *Pollard* v. *United States*, 352 U.S. 354 (1957).

In all fairness, the right to prosecute the appeal should not be lost in the instant case because, after unavoidably extended proceedings in state and federal courts, the prisoner's parole was announced to the court on the morning the appeal was scheduled for hearing. Because the time lag between initiation and final disposition of habeas corpus proceedings will so often make the remedy illusory, I would not be disposed to accept without question a state's right to bar the vindication of constitutional rights by granting a parole. One should not be made to bear the continuing burden of a constitutionally void conviction merely because the period of actual confinement having ended, no remedy can undo the unjust commitment. This is no reason to withhold the benefit of the remedy's prospective operation.

It would be difficult to explain why the statutory fiction of constructive custody over a parolee may not be availed of to supply the custody made prerequisite by section 2254 or section 2255. Nevertheless, debate on this point

seems to be foreclosed by the Supreme Court's recent decision in *Parker* v. *Ellis*, 362 U.S. 574 (1960), which held that a state prisoner's petition for habeas corpus became moot when his sentence expired. Although this is not a direct holding that a parolee is similarly without standing, we are bound to recognize that, despite intervening decisions, the per curiam opinion in *Parker* v. *Ellis* has restored the authority of *Weber* v. *Squier*, 315 U.S. 810 (1942) which, as pointed out by Judge Haynsworth, is here controlling.

On this basis I concur in the dismissal of the appeal.

[fol. 115] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8356

JOHN R. JONES, APPELLANT

vs.

W. K. CUNNINGHAM, JR., Superintendent of Virginia State Penitentiary, APPELLEE

JUDGMENT—September 14, 1961

APPEAL FROM the United States District Court for the Eastern District of Virginia.

THIS CAUSE came on to be heard on the motion of the appellee to dismiss the appeal and on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the appeal in this cause be, and the same is hereby, dismissed with costs.

SIMON E. SOBELOFF
Chief Judge, Fourth Circuit.

CLEMENT F. HAYNSWORTH, JR.
United States Circuit Judge.

HERBERT S. BOREMAN
United States Circuit Judge.

October 13, 1961, mandate withheld, at direction of Chief Judge, pending application for a writ of certiorari.

[fol. 116] • • • •

[fol. 117] Clerk's Certificate to foregoing transcript omitted in printing

[fol. 118]

SUPREME COURT OF THE UNITED STATES

No. 660 Misc., October Term, 1961

JOHN R. JONES, PETITIONER

vs.

W. K. CUNNINGHAM, JR., Superintendent of Virginia State Penitentiary

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—March 5, 1962

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Fourth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to the question of "mootness". The case is transferred to the appellate docket as No. 766 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE, 1962 636626 124

FILE COPY

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 77

JOHN R. JONES,

Petitioner,

vs.

W. K. CUNNINGHAM, JR., Superintendent of the Virginia State Penitentiary,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

F. D. G. RIBBLE
DANIEL J. MEADOR
Charlottesville, Virginia
Counsel for Petitioner

INDEX

SUBJECT INDEX

CITATIONS

CASES:

STATUTES:

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 77

JOHN R. JONES,

Petitioner,

vs.

W. K. CUNNINGHAM, JR., Superintendent of the Virginia State Penitentiary,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the Court of Appeals dismissing the appeal as moot (R. 24-33) is reported at 294 F. 2d 608. The opinion of the District Court (R. 12-13) is unreported.

Jurisdiction

The judgment of the Court of Appeals was entered on September 14, 1961 (R. 34). The petition for a writ of certiorari was filed on October 26, 1961, and was granted on March 5, 1962 (R. 35). The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

Statutes Involved

The following portions of 28 U.S.C. §2241 are involved:

> (a) Writs of habeas corpus may be granted by . . . the district courts . . . within their respective jurisdictions . . .
>
> • • • • • •
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless
>
> • • • • • •
>
> (3) He is in custody in violation of the Constitution . . . of the United States . . .

Virginia Code, §§53-257, 53-258, 53-259, 53-262, 53-264, and the Uniform Act for Out-of-State Parolee Supervision are set forth in the Appendix, *infra*.

Questions Presented

1. Whether a state prisoner's appeal from the denial of his habeas corpus petition challenging the constitutionality of his sentence should be dismissed as moot when, after the appeal is taken, the prisoner is placed on parole under the continuing custody of state officials and subject to substantial restraints on his liberty.

2. Whether, if habeas corpus is considered unavailable as a remedy for a prisoner on parole, the Court of Appeals should be directed to treat the case as an action for declaratory judgment and thereby adjudicate petitioner's claim that his sentence was imposed in violation of his constitutional right to counsel.

Statement

Petitioner John R. Jones, a prisoner in the Virginia State Penitentiary, filed a petition for habeas corpus in February, 1961, in the United States District Court for the Eastern District of Virginia, alleging that he was held by respondent in violation of the Fourteenth Amendment to the Constitution (R. 1-8). Specifically, petitioner averred that he was serving a ten-year recidivist sentence which was based in part upon a 1946 larceny conviction imposed by a Virginia court in violation of his constitutional right to counsel; the larceny conviction was therefore void and this in turn rendered the recidivist sentence void.[1]

The petition alleged that at the larceny trial in 1946 in the Chesterfield County Circuit Court, petitioner was without counsel, that he was not offered counsel by the court nor informed that he was entitled to counsel, that he was not aware that the court could appoint counsel to defend him; petitioner was then 20 years old, a private in the Army and financially unable to obtain counsel (R. 3). At a conference before trial attended only by the state prosecuting attorney, an F.B.I. agent and petitioner, it was agreed that petitioner would plead guilty to two counts of larceny of an automobile and that certain federal charges would be dropped. Petitioner at no time had the advice of an attorney (R. 5-6). The court thereupon imposed a sentence of eighteen months in the Virginia Penitentiary (R. 1). The recidivist sentence petitioner is now serving, based partially on that conviction, was imposed by the Cir-

[1] A recidivist sentence (under Va. Code, § 53-296) is void under the Fourteenth Amendment if one of the convictions on which it rests is invalid because it was imposed in violation of the constitutional right to counsel; and the recidivist sentence may be collaterally attacked on this ground. *Fitzgerald* v. *Smyth*, 194 Va. 681, 74 S.E.2d 810 (1953); *Holly* v. *Smyth*, 280 F.2d 536, 539 (4th Cir. 1960).

cuit Court of the City of Richmond in November, 1953 (R. 2, 9).

Pursuant to an order of the District Court (R. 10-11), respondent filed a return in which he admitted that petitioner was not represented by counsel at the 1946 larceny trial and that the recidivist sentence was based in part on that conviction (R. 9). Respondent, however, denied generally that the want of counsel violated any constitutional right (R. 9-10). He further asserted that petitioner had been accorded a hearing on this claim in the Chesterfield court in 1958, as evidenced by exhibits attached to the return (R. 9).

The District Court thereupon dismissed the petition without a hearing on the ground that petitioner had already been afforded a hearing on his right-to-counsel claim in the state courts and further that he had failed to show any special circumstances necessitating counsel at the 1946 trial (R. 12-13). The Court of Appeals then granted a certificate of probable cause and leave to appeal *in forma pauperis* (R. 17). Counsel were appointed to represent petitioner on the appeal (R. 17). The case was set for argument on June 23, 1961 (R. 22), and briefs on the counsel question were filed by both sides.

Approximately one week before argument the assistant attorney general representing respondent notified petitioner's court-appointed counsel that petitioner was being placed on parole by the Virginia Parole Board[2] and that respondent would move to dismiss the appeal (R. 18). On June 22, 1961, the day before argument, respondent did file a motion to dismiss on the ground that the case was

[2] For a discussion of parole for prisoners serving recidivist sentences in Virginia see Note, Recidivism and Virginia's "Come Back" Law, 48 Va. L. Rev. 597, 631-33 (1962).

moot since petitioner as a parolee would no longer be in respondent's custody (R. 19). Attached to the motion was a copy of the parole board's order placing petitioner in the custody of the board, effective June 26, 1961, and prescribing the terms of parole (R. 20-22). The order directed petitioner to live with his aunt and uncle in LaFayette, Georgia, where he would be supervised by a Georgia parole officer pursuant to the Uniform Act for Out-of-State Parolee Supervision; the order forbade petitioner to live elsewhere without official permission, and it laid down numerous other directions as to what he could do and not do (R. 19-21). Petitioner is now in Georgia on parole under this order.

On June 23, 1961, the case came on for argument in the Court of Appeals on the right-to-counsel question and the motion to dismiss (R. 22). Thereafter both parties filed memoranda on the mootness problem (R. 22). Counsel for petitioner also filed a motion to make the three members of the Virginia Parole Board parties respondent to the habeas corpus petition on the ground that they now had custody of petitioner, rather than the superintendent of the penitentiary (R. 23).[3]

The Court of Appeals, on September 14, 1961, entered a judgment dismissing the appeal (R. 34), explaining in an opinion by Judge Haynsworth (R. 24-31) that habeas corpus could not now be maintained "for the prisoner is now at large on parole. He is no longer in the custody of the defendant, the Superintendent of the Virginia State Penitentiary, where he had been confined" (R. 24). A concurring opinion was written by Judge Sobeloff (R. 31-33). The motion to make the board members parties was denied.

---

[3] In the printed Transcript of Record there is a typographical error in this motion (R. 23). The first word in paragraph 1 should be *Appellant* and not Appellee.

This Court then granted petitioner's motion for leave to proceed *in forma pauperis* and granted a petition for certiorari "limited to the question of 'mootness'" (R. 35). 369 U.S. 809.

Summary of Argument

I.

The Court of Appeals erred in holding that petitioner as a state prisoner on parole is not in "custody" within 28 U.S.C. §2241 and that habeas corpus is therefore unavailable as a means of attacking the constitutionality of his sentence. The error stems from the historically incorrect premise that habeas corpus lies only where there is actual physical detention. Contrary to the view of the court below, the Great Writ in England and America has been the remedy to remove any illegal restraint of liberty, even though it did not amount to physical custody. The test emerging from the cases is that the writ is available to anyone deprived by another of his liberty to go when and where he otherwise could lawfully go. The present federal statute incorporates this practice, and the word "custody" in §2241 is simply a shorthand label for the whole range of restraints encompassed by this rationale.

As a paroled state prisoner, petitioner is clearly within the test. He is deprived by the state parole board of the liberty to leave the town where he is told to live, to work at a job of his choice, to select the people with whom he wishes to associate, and to live in the house he likes. The terms of the parole order, backed up by Virginia statutes, substantially circumscribe his freedom and subject him to restraints to which the public generally is not subject. Petitioner can be arrested by the parole officials and put back into prison at any time without a hearing. On parole he remains under control of state officials by virtue of the

sentence which he asserts to violate his constitutional right to counsel. The shadowy, easily broken line between prison and parole is an irrational basis on which to deny petitioner a writ of habeas corpus.

Courts have issued the writ in other cases where there was no physical restraint. For example, habeas corpus has been the means for adjudicating the legality of an induction into the military service, for deciding on the custody of a child, of determining the validity of an indenture covering an apprenticed servant, and for passing on an order preventing aliens from entering this country. The restraints in these cases were similar to that imposed on the parolee here in that freedom of mobility was substantially impaired but there was no physical incarceration.

The change of petitioner's custodian from the superintendent of the penitentiary to the parole board and the removal of petitioner from the Eastern District of Virginia after his petition was filed do not divest the court of jurisdiction since petitioner was imprisoned in the district when his petition was filed and the new custodians remain there subject to the process of the court. Moreover, the parole board is empowered by Virginia statutes, the parole order, and the Uniform Act for Out-of-State Parolee Supervision to produce petitioner in the district court in response to the writ. The case is squarely within *Ex parte Endo*, 323 U.S. 283. Petitioner's motion to join the parole board members as parties should have been granted since they are now the appropriate habeas corpus respondents.

II.

Even if the Court should conclude that habeas corpus is not now an appropriate remedy because petitioner is not in "custody", the case should not be dismissed. The Court of Appeals should then be directed to treat this as an action

for declaratory judgment and proceed to decide the constitutional question. A declaratory judgment may be given because there is a justiciable controversy between petitioner and the parole board arising under the Constitution. Petitioner seeks to redress the deprivation by the state of his constitutional right to counsel. He asserts that the sentence under which he is held on parole is invalid, and the parole board asserts that it is valid. Furthermore, there is no other remedy now open to petitioner.

Since a declaratory judgment would be appropriate it should be rendered in the pending proceeding, without petitioner's being required to file suit again. The forms of action and rigid theory of pleading concepts have been abandoned in the federal courts. The remedy initially chosen by a petitioner is not controlling; the court will award whatever relief he is entitled to under the law, especially in a case like this where an indigent prisoner complains of the violation of a constitutional right.

ARGUMENT

I. Petitioner's Appeal From the District Court's Denial of His Habeas Corpus Petition Did Not Become Moot When He Was Paroled Because He Remains a Prisoner in Custody of State Officials Who Are Within the District Court's Jurisdiction Continuing the Restraint on His Liberty Under a Sentence Imposed in Violation of His Constitutional Right to Counsel.

When Jones filed his habeas corpus petition the federal court unquestionably acquired jurisdiction under 28 U.S.C. §2241 since petitioner was then imprisoned in the Virginia Penitentiary and alleged that he was held by the superintendent under a sentence imposed in violation of his constitutional right to counsel. In dismissing the case as moot

on the ground that petitioner was no longer in "custody" under §2241 since he had just been paroled, the Court of Appeals acted on the fundamentally erroneous premise that "custody" means only actual physical detention. That premise—which is also the basis of respondent's position—is unsupported by the history and purpose of habeas corpus, by §2241, and by the actual usage of the writ. Contrary to the Court of Appeals' view, habeas corpus lies to relieve a person of a variety of illegal restraints of liberty; the writ is not narrowly limited to cases of physical detention. And parole imposes restraint of a type which has traditionally been recognized as sufficient for habeas corpus.

A. *Federal Courts Are Authorized to Issue Habeas Corpus for a Prisoner Even Though He Is Not in Actual Physical Custody Because Historically Habeas Corpus Is the Remedy for One Who Is Deprived by Another of His Liberty to Go When and Where He Otherwise Could Lawfully Go.*

Habeas corpus jurisdiction has been vested in the federal judiciary by Congress from the very beginning.[4] However, the present §2241(c)(3) is a descendant of an 1867 Act which for the first time empowered the courts to grant the writ "in all cases where any person may be restrained of his or her liberty in violation of the Constitution." 14 Stat. 385. In the Revised Statutes of 1875, this provision was brought forward and put in a slightly different form: "the writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he . . . is in custody in violation of the Constitution. . . ."[5] The section immediately preceding this authorized the courts "to grant writs of habeas

[4] Judiciary Act of 1789, 1 Stat. 81-82.

[5] Rev. Stat. § 753 (1875).

corpus for the purpose of an inquiry into the cause of restraint of liberty."[6]

The 1875 provisions were retained verbatim in Title 28 of the United States Code, 1940 edition.[7] But in the 1948 revision of Title 28 the phrase "for the purpose of an inquiry into the cause of restraint of liberty" was dropped.[8] According to the revisers these words "were omitted as merely descriptive of the writ."[9] Also, perhaps significantly, the phrase "prisoner in jail," first used in 1875, was changed without explanation to simply "prisoner."

This statutory history indicates that the word "custody" in §2241(c)(3) is synonymous with "restraint of liberty." The terms have been used interchangeably in the statutes since 1867. Nothing suggests that draftsmen along the way ever intended to narrow the availability of the writ by substituting "custody" for the earlier "restrained of his or her liberty." Indeed the 1948 reviser's note indicates there was no such design. Just recently this Court said of the 1867 provision: "Although the statute has been re-enacted with minor changes at various times the sweep of the jurisdiction granted by this broad phrasing has remained unchanged."[10] "Custody" appears to be simply a shorthand way of expressing the whole range of restraints for which the writ lies.

Prior to the Act of 1867 the writ was authorized only "for the purpose of an inquiry into the cause of commitment." Debatably the older wording implies a narrower

---

[6] Rev. Stat. § 752 (1875).

[7] 28 U.S.C. § 452, 453 (1940 ed.).

[8] 28 U.S.C. § 2241 (1948).

[9] Reviser's Notes, 28 U.S.C.A. § 2241; H.R. Rep. No. 308, 80th Cong., 1st Sess. A177-A178 (1947).

[10] *Irvin* v. *Dowd*, 359 U.S. 394, 404.

kind of detention.[11] "Commitment" has a fairly well-defined legal meaning.[12] It might be inferred that by abandoning it Congress intended to remove doubts as to the availability of the writ and to make clear that a petitioner need not be in jail but only under restraint of liberty in some manner.

But whatever the pre-1867 wording meant, reading the present §2241 broadly as authorizing inquiry into an unconstitutional restraint of liberty, and not as limiting the writ merely to physical imprisonment, is in line with the history and spirit of habeas corpus from its origin in England. This is important because the statute itself does no more than authorize federal courts to issue the writ; Congress has never spelled out its meaning, its purpose, or the occasions for its use. For this the federal courts look to habeas corpus as it developed at common law. *Ex parte Bollman*, 4 Cranch 75, 93; *Ex parte Parks*, 93 U.S. 18, 21; see *United States* v. *Hayman*, 342 U.S. 205, 210. And while the writ has been expanded in scope,[13] the common law defines at least its minimum availability. Thus it is not so much the precise wording of the federal statute that governs the kind of restraint for which the writ lies as it is historical practice.

The Great Writ, or *habeas corpus ad subjiciendum*, which Jones here seeks, was developed at common law as the remedy for anyone illegally restrained of his liberty by another. See *McNally* v. *Hill*, 293 U.S. 131, 136-37. It

[11] In 1858 one text writer stated: "Whether the term 'commitment' as used in the statute [1789 Act] is to be construed as equivalent to 'imprisonment in gaol' under legal process, or as comprehending every kind of restraint, are questions which have not been decided by the Supreme Court." Hurd, Habeas Corpus 150 (1858).

[12] Black's Law Dictionary 341 (4th ed. 1957).

[13] For a prisoner under sentence of a court the scope has evolved from an inquiry limited to the sentencing court's jurisdiction to an inquiry into the violation of the prisoner's fundamental rights. See *United States* v. *Hayman*, 342 U.S. 205, 210-12.

precipitates a judicial inquiry into the legality of the restraint. Though the early petitioners were mostly persons in prison, the remedy was not limited to them. The Court of Appeals was in error historically when it said that the writ "may issue only when the applicant is in the actual physical custody of the person to whom the writ is directed" and that the purpose of the writ is to test "the legality of a present, physical detention of a person" (R. 25). The key to the writ has been a less stringent notion of restraint of liberty. As one writer put it:

> It is not necessary that the imprisonment or restraint should be close confinement to entitle a party to the writ.
>
> Every restraint upon a man's liberty is, in the eye of the law, an imprisonment, wherever may be the place or whatever may be the manner in which the restraint is effected . . .
>
> Words may constitute an imprisonment, if they impose a restraint upon the person, and he be accordingly restrained and submits . . . It may be on the high street and though the party be not put into any prison or house.[14]

Others have stated it thus:

> The test as to the right to the writ is the existence of such imprisonment or detention, actual though it may not be, as deprives one of the privileges of going when and where he pleases. Actual physical restraint, as confinement in jail, is not necessary.[15]

---

[14] Hurd, Habeas Corpus 209-10 (1858).

[15] Ferris & Ferris, The Law of Extraordinary Legal Remedies 32-33 (1926). An almost identical statement appears in Church, Habeas Corpus 351 (1886), quoting from *Commonwealth* v. *Ridgway*, 2 Ashm. 247, 248 (Pa. 1839).

And a federal court has said: "The detention it seems, is sufficient, if it restrains the party of his right to go without question, or . . . without a string upon his liberty." *Mackenzie* v. *Barrett*, 141 Fed. 964, 966 (7th Cir. 1905).

Blackstone's Commentaries, although cited by the court below (R. 25), is not opposed to these views. Blackstone merely said that "the great and efficacious writ, in all manner of illegal confinement is that of *habeas corpus ad subjiciendum*." But he did not say that "all manner of illegal confinement" meant confinement behind locked doors and nothing else. Later, in pointing out that the writ would issue even in vacation, he commented that "the King is at all times entitled to have an account, why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted." III *Blackstone Commentaries* 131 (4th ed. 1770).

In addition to Blackstone, the court below cited only a concurring opinion in *Heflin* v. *United States*, 358 U.S. 415, 421, where a statement is quoted from *McNally* v. *Hill*, 293 U.S. 131, that "Without restraint of liberty, the writ will not issue." That is of course a sound proposition. But neither the facts nor the opinions in *Heflin* and *McNally* remotely imply that there can be no restraint of liberty unless a person is physically detained in a narrow sense.

History reveals many cases on both sides of the Atlantic in which habeas corpus has issued for a variety of restraints short of bodily imprisonment. Examples may be seen in cases of soldiers complaining of illegal enlistments, apprenticed servants attacking their indentures, petitions challenging the custody of children, and aliens on Ellis Island seeking to invalidate an exclusion order barring them from entering this country though they are free to go elsewhere. These and other examples are analyzed in part C of the argument, *infra*. They bear out the rationale

suggested by the text writers: that a person is restrained of his liberty for habeas corpus purposes if he is prevented by another from going when and where he pleases, if he cannot "go without question . . . without a string on his liberty." Since no one in organized society is wholly free to go where he pleases (*e.g.*, a man cannot go upstairs in a women's dormitory) the restraint contemplated is obviously something in addition to that already imposed on the public as a whole.

Reading §2241 against history and practice, it thus appears that a petitioner is in "custody" if he is in fact subjected to significant restrictions on his freedom of mobility to which citizens generally are not subjected, even though he is not in actual physical detention. Jones, as a prisoner on parole, is precisely in that position.

B. *As a Paroled Prisoner, Petitioner Is Entitled to Challenge the Constitutionality of His Sentence by Habeas Corpus Because He Is in Custody of the State Parole Board Pursuant to the Sentence and Is Deprived by the Board of the Liberty to Go When and Where He Otherwise Would Have the Right to Go.*

That petitioner, as a state prisoner on parole, is in the custody of state officials and under restraint of his liberty is made clear by the board's parole order and the Virginia Code, both of which expressly say petitioner is in "custody", thus using the exact language of §2241.

Section 53-238(2) of the Code authorizes the state parole board to place prisoners on parole. Section 53-264 states that a paroled prisoner shall be released "into the custody of the Parole Board." And §53-257 directs that "Each parolee while on parole shall comply with such terms and conditions as may be prescribed by the Parole Board."

Acting under this authority the board issued an order granting parole to Jones (R. 20-21). The order begins, in line with the statute, by placing petitioner "under the custody and control of the Virginia Parole Board," effective June 26, 1961. (Up to that point he had been in custody of the superintendent of the penitentiary.) The order imposes numerous "general and special conditions." The special conditions require petitioner to live at the home of a Mr. and Mrs. McKinney (his uncle and aunt) at LaFayette, Georgia, and to work for Mr. McKinney, a plumber. Among the twelve general conditions are the following restrictions on his liberty—things petitioner is forbidden to do unless he can first get a parole officer's permission:

(1) Petitioner cannot leave the town of LaFayette, Georgia.[18]

(2) Petitioner cannot change his residence even within the town of LaFayette.

(3) He cannot own or operate a motor vehicle.

(4) He cannot own or have in his possession legal firearms at any time for any purpose.

Other conditions direct petitioner to "live a clean, honest and temperate life," to "keep good company and good hours," to "keep away from all undesirable places," to "work regularly," and to follow his parole officer's instructions. Petitioner is required to report once a month to his parole officer and to permit this officer to visit his home and place of employment at any time (R. 20-21).

This custody is made effective by the sweeping statutory authority in the parole officials. Section 53-258 provides that the board, or its director alone, may issue a warrant

[18] Population 5,588, according to the 1960 census.

for a parolee's rearrest "at any time, in its discretion, upon information or a showing of a violation or a probable violation by any parolee of any of the terms or conditions upon which he was released on parole. . . ." Upon such arrest the parolee is to be immediately returned "to the institution from which he was paroled, or to any other penal institution which may be designated." Indeed, under §53-259 any parole officer may arrest a parolee without a warrant if in his judgment the parolee has violated a condition. And finally, §53-262 provides that "The Board, in its discretion, may revoke the parole and order the reincarceration of the prisoner. . . ." (These parole statutes are set out in the Appendix, *infra*.)

Thus Jones may be picked up and summarily put back in the penitentiary at any time without a hearing, purely on "information" which comes to the board's attention or on the "judgment" of a parole officer. See *United States* v. *Dillard*, 102 F. 2d 94 (4th Cir. 1939). And the board can revoke the parole altogether in its unfettered discretion: the statute does not require the breach of a condition.[17] Virginia law guarantees no kind of hearing before revocation, although hearings are apparently held as a matter of policy.[18] If a hearing is given, the parolee is still, under present law, entitled to few if any of the procedural protections of the Constitution.[19] See *Escoe* v. *Zerbst*, 295 U.S. 490, 492; *Washington* v. *Hagan*, 287 F. 2d 332 (3d Cir.

[17] Va. Code, § 53-262. See Kadish, Legal Norm and Discretion in the Police and Sentencing Processes, 75 Harv. L. Rev. 904, 917 n. 42 (1962).

[18] Bureau of Public Administration, Univ. of Va., The Virginia Parole System: An Appraisal of the First Twelve Years 64 (1955). This indicates that between 1942 and 1953 paroles were revoked on 3 out of every 10 parolees.

[19] See Kadish, *supra*, note 17 at 918-19.

1960); *Martin v. United States Bd. of Parole*, 199 F. Supp. 542 (D.D.C. 1961).

The upshot is that petitioner is confined to the town, to a house, and to his job.[20] If for any reason he should go outside the limits of LaFayette, Georgia, or move to a different house, or if he should even drive an automobile around town or borrow a shotgun to go squirrel hunting, without first going to his parole officer and getting permission, the temporary restricted "liberty" which he enjoys at the parole officials' sufferance could be terminated by immediate reincarceration without judicial proceedings. He is also chained to his job; he must work for Mr. McKinney, a plumber. Since petitioner, unlike citizens generally, is prevented by the parole board from going when and where he pleases—and where he would have a lawful right to go but for the parole—he is entitled by the traditional test to a writ of habeas corpus to have the legality of the restraint judicially determined.

The restraint is made even plainer by the other general conditions. What is "good company"? What are "good hours"? What is an "undesirable place"? When does a person "work regularly"? The answers are left to the parole board or the parole officer; officials decide, without any hearing, whether Jones is abiding by these directions. Such vague standards, coupled with the broad authority to arrest, give the parole officers a sweeping power over every aspect of petitioner's life—the places he goes, the persons with whom he associates, the hours he keeps. If

---

[20] An analogy may be found in actions for false imprisonment. There plaintiff must prove he was imprisoned or confined. According to one view, if A serves on B an invalid warrant purporting to restrain B from leaving a certain town or state, A has confined B. Restatement, Torts, § 36, comment B, illustrations 6-7 (1934). The parole order does just this.

not in the penitentiary, he lives always within the long shadow of its walls.

Another condition in the order worth noting is that petitioner refrain from violating any penal laws or ordinances. On the surface this seems merely to reiterate a restriction applicable to the general public. The court below said: "If he should commit a crime, his parole may be revoked, but any other citizen would be subject to arrest for the same offense" (R. 31). This superficial view, however, overlooks a critical difference. If an ordinary citizen is suspected, for example, of taking an automobile tire from a garage he would normally be indicted for larceny by a grand jury, or at least charged on information by the prosecutor. After being arrested, the citizen would usually be released on bail pending trial. Then he would be entitled to a trial by jury with full opportunity to present a defense. All the safeguards of the Constitution surround him. The state is burdened with proving his guilt beyond reasonable doubt. But the parolee would get none of this. If "information" came to the parole board that Jones had stolen a tire he could be arrested and put back into the penitentiary forthwith. He would have no trial; the state has no burden to establish before any tribunal. This is debatably justified on several theories, one of which is that Jones is already a convicted prisoner, and the relatively relaxed custody in which the state has placed him as a matter of grace may be tightened up again without going through a trial. *Cf. Zerbst* v. *Kidwell*, 304 U.S. 359.[21] This fragile, easily broken line between prison and parole may be a useful distinction for some purposes, but it cannot rationally serve as a basis for denying petitioner any opportunity to obtain relief from his unconstitutionally imposed

[21] See Note, Parole Revocation Procedures, 65 Harv. L. Rev. 309, 310-12 (1951).

sentence while he is on parole, when admittedly he would have a remedy were he in prison.

The direction to petitioner to obey the law has another consequence. For the ordinary citizen, a traffic violation or the breach of any municipal ordinance would hardly result in confinement in the penitentiary. But this is precisely the penalty Jones could receive for such a misdemeanor, since this would be a violation of his parole.

Recognizing these realities, a number of state and federal courts have held that the writ of habeas corpus is available to a parolee. Just last year the Second Circuit decided that a pending appeal from a denial of habeas corpus was not rendered moot by the paroling of the petitioner; the court considered this simply a "change in the nature of his confinement." *United States* v. *Fay*, 289 F. 2d 470 (2d Cir. 1961). This is in line with an earlier dictum by Judge Learned Hand, *United States* v. *Bradford*, 194 F. 2d 197, 200 (2d Cir. 1952), and a prior decision to the same effect under 28 U.S.C. §2255, which likewise embodies a "custody" requirement.[22] *United States* v. *Brilliant*, 274 F. 2d 618 (2d Cir. 1960). The Ninth Circuit on two occasions has squarely held that a habeas corpus proceeding is not mooted by parole. *Egan* v. *Teets*, 251 F. 2d 571 (9th Cir. 1957); *Dickson* v. *Castle*, 244 F. 2d 665 (9th Cir. 1957).

Those decisions are of course in conflict with the Fourth Circuit's decision in the instant case. Moreover, there are cases in other circuits, relied on by the court below, which are contrary to those of the Second and Ninth.[23] A close

---

[22] *Heflin* v. *United States*, 358 U.S. 415, 418, 421 (majority and concurring opinions); *Parker* v. *Ellis*, 362 U.S. 574, 575 n.

[23] *Johnson* v. *Eckle*, 269 F.2d 836 (6th Cir. 1959); *United States* v. *Ragen*, 241 F.2d 126 (7th Cir. 1957); *United States* v. *Cummings*, 233 F.2d 187 (2d Cir. 1956); *Siercovich* v. *McDonald*, 193 F.2d 118 (5th Cir. 1951); *Adams* v. *Hiatt*, 173 F.2d 896 (3d Cir. 1949); *Factor* v. *Fox*, 175 F.2d 626 (6th Cir. 1949); *Van Meter* v. *Sanford*, 99 F.2d 511 (5th Cir. 1938).

reading, however, reveals that they rest almost entirely on this Court's order in *Weber* v. *Squier*, 315 U.S. 810, which merely denied certiorari "on the ground that the cause is moot, it appearing that petitioner has been released upon order of the United States Board of Parole and that he is no longer in the respondent's custody." The respondent in *Weber* was warden of the penitentiary, and certainly the parolee was out of his custody. That is all this Court said.[24] But with two exceptions,[25] the courts relying on *Weber* have followed it blindly without bothering to inquire whether the paroled prisoner had been transferred to the custody of an official other than the warden. In any event, *Weber*, being simply a denial of certiorari, does not stand in the way of the Court's reaching a right result on the facts of this case, now that the question is being fully argued for the first time.

Parker v. *Ellis*, 362 U.S. 574, is easily distinguishable from the case at bar. There the prisoner applying for habeas corpus completed his sentence while his case was still pending, and he was unconditionally released from all custody. He became as free as any citizen. No official thereafter exerted, or could possibly exert, any kind of restraint over his liberty by authority of that expired sentence. There was no one who could be named as a respondent. Thus the Court held that habeas corpus was moot.

---

[24] The misleading nature of *Weber* is noted in *Parker* v. *Ellis*, 362 U.S. 574, 589 n. 20 (dissenting opinion). Similar orders have accompanied denials of certiorari in *United States* v. *Downer*, 322 U.S. 756; *Zimmerman* v. *Innes*, 319 U.S. 744; *United States* v. *Crystal*, 319 U.S. 755; *Tornello* v. *Hudspeth*, 318 U.S. 792.

[25] See *Factor* v. *Fox*, 175 F.2d 626, 628-29 (6th Cir. 1949); *Van Meter* v. *Sanford*, 99 F.2d 511 (5th Cir. 1938). These opinions, however, reflect the same erroneous assumption underlying the Fourth Circuit's decision, *viz.*, that actual physical detention is essential to habeas corpus. They also represent a failure to understand realistically the nature of parole and the restraints it imposes on a prisoner.

That obviously does not touch this case where Jones remains in custody as a state prisoner restrained of his liberty by the state parole board under a sentence which does not expire until 1964.

Along with the Second and Ninth Circuits, the state courts in California and Florida have also held that a paroled prisoner may challenge the legality of the state's restraint over him by habeas corpus. *In re Marzec*, 25 Cal. 2d 794, 797, 154 P. 2d 873, 874 (1946); *In re Bandmann*, 51 Cal. 2d 388, 396, 333 P. 2d 339, 344 (1958); *Carnley* v. *Cochran*, 123 So. 2d 249 (Fla. 1960); *Sellers* v. *Bridges*, 153 Fla. 586, 15 So. 2d 293. (1943). The constitutional claim asserted in *Carnley* was reviewed on the merits by this Court. 369 U.S. 506.

The Florida Supreme Court held the writ available in *Sellers* even though the petition was initially filed by a prisoner already on parole. The Court said:

> The parolee, although at large while on parole, is a prisoner no less than a prisoner physically confined. He is enduring compulsory expiation of an offense. He is under daily personal restraint. He is at all times answerable to prison system officials for his conduct. Such officials have authority to greatly circumscribe his freedom of choice and action. Being amenable to prison system rules and authority and under immediate restraints is he not, to all practical purposes, in custody?[26]

After reviewing the conditions of the parole—similar to those in the instant case—the court then asked further: "Can there be any doubt but that the terms and conditions imposed by the Parole Commission operate to greatly

[26] 153 Fla. 586, 588, 15 So.2d 293, 294 (1943).

restrict the fundamental liberties and privileges of the individual?" Obviously the court had little doubt, for it discharged the petitioner on finding invalid the sentence under which he was paroled.

Judicial expressions in other contexts support the idea that a paroled prisoner remains in custody, that parole is a continuation of imprisonment, though in ameliorated form, and that it is in effect "an extension of the prison walls." *Anderson* v. *Corall*, 263 U. S. 193; *United States* v. *Dillard*, 102 F. 2d 94, 96 (4th Cir. 1939); *Story* v. *Rives*, 97 F. 2d 182, 188 (D.C. Cir. 1938); *United States* v. *Nicholson*, 78 F. 2d 468 (4th Cir. 1935); *Bell* v. *United States*, 203 F. Supp. 371 (N.D. Wisc. 1962); *Serio* v. *Liss*, 189 F. Supp. 358, 362-63 (D.N.J. 1960). Moreover, this Court has indicated that parole is punishment within the Ex Post Facto Clause. *Lindsey* v. *Washington*, 301 U.S. 397. And in *Korematsu* v. *United States*, 319 U.S. 432, 435, the Court likened parole to probation in commenting that probation is punishment whereby "the liberty of an individual judicially determined to have committed an offense is abridged in the public interest."

As the National Parole Conference has said, parole is an integral part of the system of criminal justice.[27] It is a way of handling a criminal offender which grew out of a shift of penal philosophy from punishment to reformation. Along with probation and juvenile courts, it is a means of restoring the offender to society while at the same time protecting society from the offender.[28] Parole is an effort to bridge the gap for the prisoner between the abnormal environment of the penitentiary and the environment of the community to which he will return when his sentence

[27] Bureau of Public Administration, Univ. of Va., The Virginia Parole System: An Appraisal of Its First Twelve Years 1 (1955).

[28] Giardini, The Parole Process 5, 18-19 (1959).

expires. The Florida court put it well in *Sellers* v. *Bridges*, *supra*:

> Parole, therefore, is not an act of amnesty or forgiveness—as some suppose. It does not put an end to sentence legally imposed. Rather, it is a continuation of sentence. The parole plan proceeds, in theory at least, upon the salutary principle that as the prison sentence of the individual must eventually terminate, the ends of society as a whole, as well as of the individual prisoner, will be better served by providing the prisoner a transition period for adjustment for the completely artificial life in a penal institution under continuous physical restraint and free from economic and social pressures to the untrammeled life of a free individual in a highly competitive society. The Florida Parole Commission is given statutory authority to determine the terms and conditions under which the prisoner may secure parole. Once secured, and upon the terms and conditions imposed by the Commission, prisoners become parolees (trustees outside prison walls, as it were) but prisoners amenable to discipline, direction, and supervision of prison system officials none the less.[29]

Thus a parolee is a prisoner still under sentence, one whom the state has permitted to move a step back toward ultimate freedom. To allow the state thereby to immunize the sentence from constitutional attack runs counter to common sense and the spirit of habeas corpus.[30] A statement made long ago seems applicable here:

---

[29] 153 Fla. 586, 589, 15 So.2d 293, 295 (1943); see also Giardini, *supra*, note 28 at 19.

[30] There is no merit in the suggestion that by accepting parole rather than penitentiary confinement Jones has waived his constitutional claim. When the state affords its prisoner a choice be-

> It is not necessary, that the degradation of being incarcerated in a prison, should be undergone, to entitle any citizen who may consider himself unjustly charged with a breach of the laws, to a hearing. The whole spirit of the law is in favor of liberty; and if the words [of the Habeas Corpus Act] were doubtful, they should be construed liberally in favor of that blessing.[31]

The Great Writ must keep pace with all the varieties of restraints on liberty which may be devised. Parole is a relatively modern development in penology, coming on the scene in the last half of the Nineteenth Century. By 1901 only twenty states had parole laws, while today every state has a parole system.[32] As penology continues to evolve, it is likely that additional ways will be found by which to deal with prisoners, other than simply keeping them in jail.[33]

---

tween two kinds of custody and he chooses the less stringent; he cannot fairly be said to have surrendered his claim that his sentence is void and the state is without legal authority to hold him in any fashion. Concerning this point a court said: "But the agreement to be so bound [by the parole order] . . . must necessarily presuppose a valid imprisonment in the first instance to support the agreement. Such agreement may not be upheld if based upon a void charge or void judgment." *Sellers* v. *Bridges*, 153 Fla. 586, 590, 15 So.2d 293, 295 (1943).

[31] *Commonwealth* v. *Ridgway*, 2 Ashm. 247, 248 (Pa. 1839), quoted in Church, Habeas Corpus 351 (1886).

[32] Giardini, The Parole Process 12 (1959).

[33] For example, Va. Code, § 19.1-300 provides that when a defendant is convicted and "it is made to appear to the court that in the event of his being sentenced to confinement in jail his dependents may become public charges, [the court] may provide in the sentence for the release of such person from confinement on the days he is regularly employed under the supervision of a probation officer or such other suitable person as the court may designate, and under such conditions as it may fix, and require such person to pay such portion of any money earned by him as the court may determine to the court to be used for the support and maintenance of dependents and payment of fines, if any." Although a prisoner working on a job under this statute would not be in confinement, it is difficult to believe that habeas corpus would be unavailable to him.

If the writ is to serve its historic purpose it cannot be limited solely to the kind of restraint known to the Eighteenth Century. If habeas corpus can evolve in scope from a narrow inquiry into the jurisdiction of the sentencing court to an inquiry into a whole range of due process violations in the trial,[34] it is surely capable of acknowledging a type of restraint other than physical detention. That it has long ago done so, is revealed by the discussion which follows.

C. *Habeas Corpus Is Available to a Paroled Prisoner Because He Is Subjected to a Kind of Restraint Which Traditionally Has Been Recognized as Sufficient for Habeas Corpus.*

Since petitioner's liberty is in fact restrained by state officials this is an orthodox case for the use of habeas corpus to test the legality of the restraint. Viewed historically, there is no novelty about it. Anglo-American courts for two centuries have granted the Great Writ to release individuals from illegal restraints on their liberty other than physical confinement.

As a fairly recent example, the writ was granted where a petitioner, although committed to jail by court order, had never been put in jail but had been allowed to return home to attend his sick child on his promise to the sheriff that he would not leave his home or his office. *Ex parte Snodgrass*, 43 Tex. Cr. 359, 65 S.W. 1061 (1901). The court said that "any character or kind of restraint that precludes an absolute and perfect freedom of action" authorized the court by habeas corpus to release the person from such restraint, if illegal. See also *Ex parte Foster*, 44 Tex. Cr. 423, 71 S.W. 593 (1903). In *Ex parte Messervy*,

[34] Compare *Ex parte Watkins*, 3 Pet. 193, with *Johnson v. Zerbst*, 304 U.S. 458. See *United States v. Hayman*, 342 U.S. 205, 211-12.

80 S.C. 285, 61 S.E. 445 (1908), under a writ of *ne exeat* forbidding him from leaving the state, the petitioner had been arrested but then released on bail conditioned on his not departing the state. Although petitioner was at large the court allowed habeas corpus, saying that "the object of the writ is to release a citizen from any illegal restraint of his liberty."

Courts in this country have long utilized habeas corpus as a means of adjudicating the legality of an enlistment or induction into the military service.[35] The only detention in these cases is the mere state of being in the army or navy. There is no actual physical custody. These are not cases of arrest or court-martial conviction, for there the soldier would be under physical restraint, unlike other soldiers. Most courts have decided the legality of the enlistment or induction without even discussing the sufficiency of the restraint to support the writ. But in the few cases where it has been raised the courts have held that the requisite restraint was present. For example, in *United States* v. *Graham*, 57 F. Supp. 938, 941-43 (E.D. Ark. 1944), the court noted that the individual "is under no more restraint than any other soldier on active duty, who is subject to all the orders of his superior, both general orders and those directed to him personally," and then went on to say that the kind of restraint an enlisted man is under entitles him to the writ if his induction is illegal. Even less re-

[35] For early examples, see *United States* v. *Anderson*, 24 Fed. Cas. 813 (No. 14,449) (C.C.D. Tenn. 1812); *In re Falconer*, 91 Fed. 649 (S.D.N.Y. 1898); *In re Carver*, 103 Fed. 624 (C.C.D. Me. 1900); *Commonwealth* v. *Harrison*, 11 Mass. 63 (1814); *Moncrief* v. *Jones*, 33 Ga. 450 (1863); *Commonwealth* v. *Murray*, 4 Binn. 487 (Pa. 1812); *State* v. *Dimick*, 12 N.H. 194 (1841); *In re Carlton*, 7 Cow. 471 (N.Y. 1827). For later examples, see *Ex parte Cohen*, 254 Fed. 711 (E.D. Va. 1918); *Arbitman* v. *Woodside*, 258 Fed. 441 (4th Cir. 1919); and cases collected in *Hirabayashi* v. *United States*, 320 U.S. 81, 108 n. 2 (concurring opinion); Note, 10 Geo. Wash. L. Rev. 827, 829 n. 7.

straint existed in *United States* v. *Flint*, 54 F. Supp. 889 (D. Conn. 1943), *aff'd*, 142 F. 2d 62 (2d Cir. 1944), where a draftee petitioned for habeas corpus alleging that he had been illegally classified as 1-A. He had reported for induction, been placed under the authority of the commanding officer of the induction center, then put on inactive duty, transferred to the reserve, and released to return to his home with orders to report back some two weeks later. During that two-week period, when he filed the habeas corpus petition, he was free to go where he pleased. Yet the court rejected respondent's contention that the writ was unavailable for lack of restraint. And in *Ex parte Fabiani*, 105 F. Supp. 139 (E.D. Pa. 1952), the writ issued with still less restraint, for there the petitioner was merely under an order to report for induction into the army but had not yet reported to any official.

In another army case, the court held habeas corpus available to a soldier "administratively restricted" to the limits of a camp; he was not actually confined under lock or guard. *Girard* v. *Wilson*, 152 F. Supp. 21 (D.D.C. 1957), *rev'd on other grounds*, 354 U.S. 524.

These cases are unequivocal evidence that federal courts do not require the kind of close physical detention the court below spoke of before habeas corpus becomes available. They show that the writ is available to a person who, by a realistic appraisal of the circumstances, is deprived of his freedom to go and come at will. It takes little argument to establish that a person in the Army is not a free man. His situation is similar to that of a parolee. A soldier can go off post on week ends or at night on a pass. Indeed if he is married and lives off the post, as is true of many soldiers today, he goes home every night and practically is as free as a civilian. Yet he is still under a very real control, as is a parolee, to which citizens generally are not subject.

He must obey all orders of his commanding officer, and he is governed by the stringent regulations of the Military Code, just as a parolee must obey the parole officer and is governed by the terms of the parole order. A commanding officer has power to produce the body in court just as a parole officer does. As a remedy for illegal detention, habeas corpus should be as available to a parolee unconstitutionally convicted as it is to a soldier unlawfully inducted.

Wales v. *Whitney*, 114 U.S. 564, is distinguishable from the above cases as well as from the instant case. There court-martial charges were preferred against a naval medical officer already stationed in Washington, D. C.; the Secretary of the Navy placed him under arrest and ordered him to confine himself to the limits of the City of Washington pending trial. The officer filed a habeas corpus petition attacking the legality of his arrest on the ground that a court martial was without jurisdiction to try him on the charges preferred. The Court held habeas corpus unavailable. The following passage is the key to the decision:

> . . . as Medical Director, he [petitioner] was residing in Washington and performing there the duties of his office. It is beyond dispute that the Secretary of the Navy had the right to direct him to reside in the city in performance of these duties. If he had been somewhere else the Secretary could have ordered him to Washington as Medical Director, and, in order to leave Washington lawfully, he would have to obtain leave of absence. He must, in such case, remain here until otherwise ordered or permitted. It is not easy to see how he is under any restraint of his personal liberty by the order of arrest, which he was not under before (114 U.S. at 569-70).

In other words, the petitioner was already confined to Washington by lawful orders of the Secretary. The arrest order thus placed no additional restraint on his liberty. Absent the arrest, he would still have been under the identical restrictions, *i.e.*, under orders stationing him in Washington. The court did not say that the restraint would have been insufficient had the officer been attacking the power of the naval authorities to subject him to any control. In fact it seemed to recognize this by saying that "those under military control, may all become proper subjects of relief by the writ of habeas corpus" (114 U.S. at 571). The fatal defect in *Wales* was that even if the court voided the challenged order the decision would not have resulted in the petitioner's release from the respondent's control. In this respect, the case is like that of a prisoner serving two sentences concurrently, one of which is valid and the other invalid; he cannot by habeas corpus obtain an adjudication as to the invalidity of one sentence since he would not be entitled to release in any event. *E.g., Ex parte Behrens*, 55 F. Supp. 460 (E.D. Wash. 1944).

Jones, however, as a paroled prisoner is in a materially different position. The parole order here, unlike the arrest order in *Wales*, does restrain petitioner in a way that he would not be restrained in the absence of the order. If the parole order and the sentence on which it rests were nullified Jones would be relieved of this restraint and would be as free as any citizen. A decision in his favor would result in his immediate release. *McNally* v. *Hill*, 293 U.S. 131, 138.

Child custody cases are further proof that habeas corpus lies for restraints far short of physical confinement. For over a century and a half the writ has been available to a parent to obtain the release of his child from the custody of one not legally entitled to custody. The courts have been unconcerned with whether the child was forcibly detained,

Indeed it affirmatively appears that this has not been essential. For example, in *Ex parte M'Clellan*, 1 Dow. 81 (K.B. 1831), the court expressly said that no showing of "any force or restraint" was necessary. In *Earl of Westmeath* v. *Countess of Westmeath*, 1 Jac. 251 (Ch. 1821), a habeas corpus proceeding brought by the Earl against his wife, the children were simply living with the wife. The court said that in the wife's return to the writ "it was stated that she lived separate and apart from her husband; that the infants were not under imprisonment, restraint, or duress of any kind . . . that she had the care and custody of their persons. . . ." Yet this did not defeat the writ, and the children were ordered released from the mother. In commenting on this the Georgia court once said: "To confine the writ of habeas corpus at common law, exclusively to cases of illegal confinement, would be destructive of the ends of justice." *In the Matter of Mitchell*, 1 Ga. Rep. Ann. 291 (1836).[30]

In *Rex* v. *Delaval*, 3 Burr. 1434 (K.B. 1763), an eighteen year old girl had entered into "Covenants of Indentures of Apprenticeship" and was thereby apprenticed to a musician who in turn assigned her to Delaval who kept her as a mistress. It appeared that she "resided in his house, and publically rode out on his Horses, attended by his Servants." Lord Mansfield, before whom a habeas corpus proceeding was brought on behalf of the girl, was not troubled by the sufficiency of the restraint to support the writ, and he ultimately ordered that she "be discharged from all Restraint, and be at liberty to go where she will."

The *Delaval* case is important because of the close similarity between an apprentice or indentured servant and a

[30] Other early cases of this type are *Mercein* v. *People*, 25 Wend. 64 (N.Y. 1840); *Commonwealth* v. *Briggs*, 16 Pick. 203 (Mass. 1834); *Commonwealth* v. *Addicks and Lee*, 2 Serg. & Rawle 174 (Pa. 1816).

parolee. Each has a certain limited amount of freedom. Such a person is not physically imprisoned. But he is committed to the custody of someone else and is restricted in his place of abode, his job, and his activities generally. His liberty is substantially less than that of ordinary citizens. The crucial point for habeas corpus is that an individual in these positions cannot go when and where he pleases. In fact, the idea of modern parole, emerging after the mid-nineteenth century, seems to have come in part from the earlier servant arrangement.[37] Thus if the writ of habeas corpus lay in 1763 to free a person (not a prisoner) from an illegal indenture it follows that the writ lies today to free a parolee (who is a prisoner) from an illegal sentence.

The position of one held in slavery in pre-Civil War America is likewise analogous to that of a parolee, differing only perhaps in the degree of restraint. Most slaves were not in physical custody. In the country they roamed the fields, while a house servant in town often went about the streets unattended. Nevertheless, habeas corpus was recognized as a remedy for one claiming to be held illegally in slavery. See, *e.g.*, *United States* v. *Davis*, 5 Cranch C.C. 622 (D.C.C.C. 1839). And rightly so, because a slave, like a parolee, is deprived by another of his freedom of mobility.

Aliens under exclusion orders preventing their entry into the United States have been allowed by this Court to challenge the validity of such orders by habeas corpus. *Shaughnessy* v. *Mezei*, 345 U.S. 206, 213; *Knauff* v. *Shaughnessy*, 338 U.S. 537; *United States* v. *Jung Ah Lung*, 124 U.S. 621, 626. In those cases the aliens were not bodily imprisoned. As far as the government was concerned they could have taken any outbound ship to any point in the world. The only restraint on their liberty being imposed by the respondents was the prevention of entry into this country. Yet

[37] See Giardini, The Parole Process, 5-12 (1959).

the Court had no difficulty in seeing this in its practical light as a restraint for which the Great Writ would lie. See also *Brownell* v. *Tom We Shung*, 352 U.S. 180, 183: "Admittedly, excluded aliens may test the order of their exclusion by habeas corpus." Again, this is in line with the rationale that for purposes of habeas corpus a person is restrained of his liberty whenever he is prevented by another from going when and where he pleases.

To support its position the court below pointed out that the writ was unavailable to a person charged with crime but at large on bail, citing two decisions of this Court.[38] Bail, however, is distinguishable from parole. A person on bail is generally under no restraint other than the duty to appear in court on a future date. While on bail he is not subject to the present, continuing restrictions which circumscribe a parolee's freedom. Even so, some federal and state courts have allowed habeas corpus to petitioners on bail. *Bates* v. *Bates*, 141 F. 2d 723 (D.C. Cir. 1944); *Mackenzie* v. *Barrett*, 141 Fed. 964 (7th Cir. 1905); *In re Petersen*, 51 Cal. 2d 177, 331 P. 2d 24 (1958); *Ex parte Messervy*, 80 S.C. 285, 61 S.E. 445 (1908).

D. *The Change of Petitioner's Custodian From the State Penitentiary Superintendent to the State Parole Board Does Not Defeat His Pending Habeas Corpus Petition Because the State Parole Board Members Are Within the Jurisdiction of the District Court and Have Power to Produce Petitioner in Response to the Writ.*

The appropriate respondent to a petition for habeas corpus is the person who has custody of the petitioner, *i.e.*, the one who is restraining his liberty and who has power

---

[38] *Johnson* v. *Hoy*, 227 U.S. 245; *Stallings* v. *Splain*, 253 U.S. 339.

to produce him in court. 28 U.S.C. §2243.[39] Thus the members of the Virginia State Parole Board are now the proper parties respondent since, as previously discussed, they are imposing the restraint on petitioner's liberty and are his custodians by virtue of the parole order and the Virginia Code.[40] Moreover, as will be shown below, they can produce petitioner in court. Custody over petitioner has simply passed from one state official, the superintendent of the penitentiary, to other state officials, the parole board members.

The change of custodians by the state during the pendency of the habeas corpus application does not defeat the proceeding. The members of the parole board are all in the Eastern District of Virginia and thus within the territorial jurisdiction of the United States District Court where the petition was filed and where Jones was then detained. They are continuing custody over petitioner under the same allegedly unconstitutional sentence which was the basis of the superintendent's previous custody. The Commonwealth of Virginia continues to resist the issuance of the writ. The case thus comes squarely within *Ex parte Endo*, 323 U.S. 283, 304-07, where the petitioner, like Jones, was removed from the district after having filed a habeas corpus petition but an appropriate respondent remained in the district; the Court held there was no loss of jurisdiction. There is no requirement that the petitioner himself remain within the district throughout the proceeding. The writ is directed to the custodian, and it is

---

[39] This statute reads: "The writ, or order to show cause shall be directed to the person having custody of the person detained. . . .

* * * * *

"Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained." See *Johnson* v. *Eisentrager*, 339 U.S. 763, 778.

[40] Va. Code, §§ 53-257, 53-258, 53-259, 53-262, 53-289(3).

enough that a custodian can be reached by the district court's process. This is not a case like *Ahrens* v. *Clark*, 335 U.S. 188, where the petitioner was not being detained in the district at the time he initially filed his petition. The Court in *Ahrens* expressly distinguished the *Ex parte Endo* situation (335 U.S. at 193). See *Carbo* v. *United States*, 364 U.S. 611, 621-22.

Power in the board to produce petitioner in the district court in response to the writ is revealed by the recitation in the order that Jones is placed under the "control of the Virginia Parole Board," and the direction that Jones "Follow the parole officer's instructions" (R. 20, 21). If the parolee fails to obey an instruction the board may issue a warrant for his arrest, Va. Code, §53-258, or a parole officer may arrest him without a warrant, Va. Code, §53-259.

Jones, though a Virginia prisoner, is paroled in Georgia under the Uniform Act for Out-of-State Parolee Supervision (R. 19) which has been adopted by both states. Va. Code, §53-289; Ga. Code, §27-2701a (set out in the Appendix, *infra*). The Act provides:[41]

> That duly accredited officers of a sending State [Virginia] may at all times enter a receiving State [Georgia] and there apprehend and retake any person on probation or parole. For that purpose no formalities will be required other than establishing the authority of the officer and the identity of the person to be retaken. All legal requirements to obtain extradition of fugitives from justice are hereby expressly waived on the part of States party hereto, as to such persons. The decision of the sending State to retake a person on probation or parole shall be conclusive upon and not reviewable within the receiving State. . . .

[41] Va. Code, § 53-289 (3); Ga. Code, § 27-2701a (3). Moreover, Jones signed the following at the foot of the parole order: "I

This underscores the real power the Virginia board retains over Jones. Although there are no reported decisions dealing with this provision in Virginia or Georgia, courts of other states where the Act is in force have held, in accordance with its clear wording, that the receiving state has no authority to inquire into the reasons why a parolee is picked up by the sending state; the only questions open in the receiving state are the identity of the parolee and whether the arresting officer is in fact an official of the sending state.[12] Furthermore, on word from the sending state an officer of the receiving state can arrest the parolee, and the receiving state's courts will still refuse to look behind the action.[13]

From all this it appears that the Virginia parole board has several means for producing Jones in the federal court

---

agree that in the event I am arrested in any state or jurisdiction of the United States or any of its possessions for violation of this parole or for the commission of another offense, I will waive extradition and will return voluntarily to the state of Virginia" (R. 21-22).

[12] *Woods* v. *State*, 264 Ala. 315, 87 So.2d 633 (1956); *Gulley* v. *Apple*, 213 Ark. 350, 210 S.W.2d 514 (1948); *In re Tanner*, 20 Cal.2d 670, 128 P.2d 338 (1942); *People* v. *Ruthazer*, 98 N.Y.S.2d 104 (1950), *aff'd*, 304 N.Y. 302, 107 N.E.2d 458 (1952); *Nagy* v. *Alvis*, 87 Ohio App. 251, 89 N.E.2d 147 (1949), *aff'd*, 152 Ohio St. 515, 90 N.E.2d 582 (1950); *Pierce* v. *Smith*, 31 Wash.2d 52, 195 P.2d 112 (1948). These decisions also hold the Act constitutional. It has been adopted in 48 states; citations are collected at Pa. Stat. Ann. tit. 61, § 321 (Supp. 1961).

[13] *State* v. *Waters*, 268 Ala. 454, 108 So.2d 146 (1959). Since the Act provides that the duties of supervision are to be governed by the same standards which prevail for the receiving state's own parolees (Va. Code, § 53-289[2]; Ga. Code, § 27-270[a][2]), it appears that the Georgia parole officials could arrest petitioner, without any request or order from the Virginia board, for a violation of any conditions of the parole, including failure to obey the Georgia parole supervisor's instructions. See Ga. Code, §§ 77-515, 77-517, 77-518. But this authority in the Georgia officials in no way subtracts from the power over petitioner vested in the Virginia board independently of the Georgia authorities.

in Virginia in response to a writ of habeas corpus. In the first place, the board can order Jones to appear in court: if he fails to comply he can be arrested and then taken to Richmond, because disobedience of instructions is a violation of a condition of the parole. Furthermore, the board could dispatch an agent to Georgia to "apprehend and retake" petitioner under the Uniform Act and bring him back to Richmond; this would not be subject to any interference from Georgia courts or officials. While these means are ample to produce petitioner in court by force if necessary, it is unlikely that such ultimate power will have to be invoked, for after all Jones himself is seeking the writ and would no doubt be quite willing to appear. It is interesting to note, because it highlights the board's control over Jones, that he would violate his parole and be subject to reincarceration if he did go to Richmond without official permission, as that would breach the condition forbidding him to leave the town of LaFayette, Georgia.

Since the members of the Virginia parole board presently have custody and control over petitioner, are within the district court's jurisdiction, and are legally and factually empowered to produce petitioner in the district court, they are appropriate respondents. Of course they were not named in the original habeas corpus petition because they had not acquired custody of petitioner at that time. Custody passed to them after the district court had denied the petition and while the case was awaiting argument in the Court of Appeals. Promptly after the board obtained custody from the superintendent (which was on June 26, 1961) petitioner made a motion in the Court of Appeals that the board members be made parties respondent (R. 23). The granting of this motion was all that was necessary to keep the proceeding from becoming moot.

Adding new custodians as parties to prevent a habeas corpus proceeding from failing for mootness has been done

before and presents no difficulty. In *Knewel* v. *Egan*, 268 U.S. 442, 448, a state prisoner had brought a habeas corpus proceeding in the federal district court seeking release from the custody of a sheriff. While the case was in this Court on appeal the original respondent, the person who had been serving as sheriff, went out of office and a newly elected individual took his place. The Court on motion ordered the new sheriff substituted. And in *Savelis* v. *Vlachos*, 137 F. Supp. 389 (E.D. Va. 1955), *aff'd*, 248 F. 2d 729 (4th Cir. 1957), a habeas corpus petition by seamen on a vessel docked at Norfolk, the master of the vessel was initially named respondent. But pending hearing the petitioners were transferred to a Public Health Service Hospital. The district judge said that since the master of the vessel was no longer custodian of petitioners the court, to avoid mootness, would order the substitution of the immigration officials as parties respondent having actual custody of petitioners during their stay at the hospital (137 F. Supp. at 400). See also *Ex parte Endo*, 323 U.S. 283, 306-07.

By dismissing this case and disregarding the motion to make the members of the parole board parties, the court below has in effect sanctioned a violation of Supreme Court Rule 49(1) which reads:

> Pending review of a decision refusing a writ of habeas corpus, or refusing a rule to show cause why the writ should not be granted, the custody of the prisoner shall not be disturbed, except by order of the court wherein the case is then pending, or of a judge or justice thereof, upon a showing that custodial considerations require his removal. In such cases, the order of the court or judge or justice will make appropriate provision for substitution so that the case will not become moot.[11]

[11] 346 U.S. 999. The Fourth Circuit's Rule 25 is similar: "Pending review of a decision refusing a writ of habeas corpus, the custody of the prisoner shall not be disturbed."

Unquestionably the "custody of the prisoner" here was "disturbed" by the state without any court order, and the court below has refused to "make appropriate provision for substitution so that the case will not become moot." The Court of Appeals has thus allowed the state, whatever its motive, to frustrate the Great Writ by the simple expedient of transferring petitioner from the custody of one official to the custody of other officials on the eve of argument. The purpose of Rule 49(1) is to prevent just this from happening. See *Bolden* v. *Clemmer*, 298 F. 2d 306 (D.C. Cir. 1961). Happily in this case the matter can be rectified by bringing in the new custodians since they are within the district court's reach. *Ex parte Endo, supra.* The judgment of the Court of Appeals should be reversed with directions accordingly.

II. If the Court Concludes That Petitioner's Constitutional Claim Could No Longer Be Adjudicated by Habeas Corpus After He Was Paroled, the Court of Appeals Should Be Directed to Consider the Case as a Declaratory Judgment Action and Thereby Decide the Claim Because This Is a Civil Action Presenting a Justiciable Controversy Within the Court's Jurisdiction and There Is Now No Other Remedy for Violation of Petitioner's Constitutional Right to Counsel.

A holding that this case is moot as a habeas corpus proceeding, for a reason peculiar to habeas corpus, *viz.*, that petitioner is not now in "custody" under §2241, still does not require a dismissal. The action can be treated as one for a declaratory judgment that the sentence is constitutionally invalid, and the court can proceed to decide the same question it would have decided on habeas corpus—whether petitioner's right to counsel was violated in the 1946 larceny conviction.

By not discussing the declaratory judgment question, although it was argued by petitioner, the Court of Appeals

has left unclear whether it believed this remedy is not available at all to petitioner or whether it thought that even though the remedy is appropriate petitioner should file suit all over again in the district court, labelling his papers "declaratory judgment" instead of "habeas corpus." Either way the court erred.

Section 2201 of Title 28 authorizes any court of the United States in an actual controversy within its jurisdiction to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought."

There is here a justiciable controversy within Article III of the Constitution. On the one hand, Jones claims that because of the unconstitutional denial of counsel in his larceny trial that conviction is void as well as the subsequent recidivist sentence under which he is held on parole, that the Virginia authorities accordingly cannot lawfully confine him in prison or subject him to the restrictions of parole. On the other hand, the Virginia Parole Board, as successor to the penitentiary superintendent, claims that the recidivist sentence is valid and that under it Jones may be kept on parole or even reincarcerated. (It is here assumed that the parole board members should be made parties pursuant to petitioner's motion [R. 23] and as argued above.) This is a genuine clash between adverse parties over present legal interests. Judge Sobeloff agreed in his concurring opinion below that the case was still justiciable (R. 32), citing *Fiswick* v. *United States*, 329 U.S. 211, 220-23. The other two judges did not disagree with this; they simply did not reach the question.

Not only is the case within Article III, it also falls within the congressional grant of authority to the federal courts in 28 U.S.C. §1343(3), for this is clearly an action "to redress the deprivation, under color of . . . state law . . ."

of a "right secured by the Constitution of the United States. . . ." If this statute can support jurisdiction to enjoin a state criminal prosecution on the ground that the prosecution would infringe First Amendment rights, *Douglas* v. *City of Jeannette*, 319 U.S. 157, *a fortiori* it allows an action for a declaration that a sentence (admittedly subject to collateral attack) was imposed in violation of the Constitution.

Since the case falls within the Constitutional and statutory authority of the federal courts, there is no objection on principle or authority to giving a declaration as to the validity of petitioner's sentence, especially since he now has no other remedy. Indeed, authority supports it. For example, it has been held that a prisoner can attack a parole revocation proceeding by a declaratory action even though habeas corpus is also available. *Hurley* v. *Reed*, 288 F. 2d 844 (D.C. Cir. 1961); *Washington* v. *Hagan*, 287 F. 2d 332 (3d Cir. 1960). Of course if habeas corpus is not open, as would be the case here, then the reason for a declaratory judgment is much stronger.[45] The parolee's position is like that of an alien under an exclusion order, as in *Brownell* v. *Tom We Shung*, 352 U.S. 180, where the Court explained that the order can be attacked by habeas corpus if the alien is detained, but, in any event, he can get an adjudication of the same question by way of a declaratory decree. The scope of review would not differ. Likewise, if the petitioner here is considered not in "custody" the court can nevertheless give a declaration as to the unconstitutionality

[45] Two federal decisions refusing declaratory judgments to prisoners attacking their sentences were based on the ground that other remedies were available. *Tuckson* v. *Clemmer*, 231 F.2d 658 (4th Cir. 1956); *Clark* v. *Memolo*, 174 F.2d 978 (D.C. Cir. 1949). Neither is in point here, since Jones is without any other remedy. Compare *Bell* v. *United States*, 203 F. Supp. 371 (W.D. Wisc. 1962), where the reasons for denying declaratory relief to a parolee are likewise not applicable here.

of his sentence, as this would not involve the "custody" requirement.

The indirect suggestion in two dissenting opinions in *Parker* v. *Ellis*, 362 U.S. 574, 585, 597, 598, that habeas corpus is the sole remedy for an unconstitutionally convicted state prisoner, whatever its merit in that case, does not apply here. In *Parker*, the prisoner had fully served his sentence, and the lack of any adverse party defendant might have been enough to destroy justiciability and hence block a declaratory judgment. Obviously the general manager of the Texas state prison system, the only party named there by petitioner, no longer had a justiciable dispute with the former inmate—and no effort appears to have been made to join anyone else as a defendant. Here, by contrast, Jones has moved to bring in the Virginia Parole Board against whom he has a continuing live claim as to his unexpired sentence. But in any event, *Parker* is no authority for denying declaratory relief, because this question was neither raised nor decided there.

In opposition to giving petitioner relief, it might be argued that because the Virginia state courts have passed upon and rejected petitioner's federal claim a declaratory action is barred by *res judicata*, although the objection would not apply to a habeas corpus application. *Brown* v. *Allen*, 344 U.S. 443, 458; *Darr* v. *Burford*, 339 U.S. 200, 214. While the argument may have a superficial appeal, it is submitted that history and close analysis require its rejection.

The historical reasons for exempting habeas corpus from the ordinary rules of *res judicata* tend to be overlooked. Today the point is usually made by assertion without explanation, as in *Darr* v. *Burford*, *supra*, where the Court said, "All the authorities agree that *res judicata* does not apply to applications for habeas corpus." The court there

cited *Salinger* v. *Loisel*, 265 U.S. 224, 230, which held that a decision by a federal court on habeas corpus refusing to discharge a prisoner would not be *res judicata* in a later federal habeas corpus application. In both *Darr* and *Salinger* the former proceeding in question was habeas corpus. The common law and text writers agree with this Court that one adverse habeas corpus decision does not preclude repetitious applications. *Darr* v. *Burford*, made it clear that a *state* habeas corpus decision does not bar habeas corpus in the *federal* courts.

The policies underlying this rule likewise require that a state habeas corpus ruling, as in the instant case, not be *res judicata* in a federal declaratory action. A decision on habeas corpus has always been unique. Historically, it was denied *res judicata* effect because it was not considered a final judgment,[46] and only final judgments traditionally operate as *res judicata*.[47] The common law apparently took this view because of the importance attached to "the liberty of the subject"; a person was thus allowed to go from judge to judge, and any judge could grant him freedom even though others previously had denied the writ. See *Brown* v. *Allen*, *supra* at 509.[48]

---

[46] Church, Habeas Corpus 518-19 (1886); Hurd, Habeas Corpus 562-70 (1858). At common law this lack of finality also prevented review of a habeas corpus decision by writ of error. This non-reviewable aspect has been changed by statute in the federal courts. 28 U.S.C. § 2253.

[47] Restatement, Judgments § 41 (1942).

[48] In *Brown* v. *Allen*, 344 U.S. 443, 458, the Court, apparently for the first time, said that even though the federal claim had been passed on in the original state trial and on direct appellate review the state judgment would still not be *res judicata* in a federal habeas corpus court. This goes beyond the common law rationale set out in the text, and it is not the case here since the Virginia courts passed on Jones' federal claim only on habeas corpus. The view in *Brown* probably resulted from the expanded scope of habeas corpus brought about under the 1867 Act and by the wider protections now afforded criminal defendants by the Fourteenth Amendment.

That being so, it is immaterial whether the later action is another habeas corpus petition or an action for declaratory judgment. The policy still holds. In either case the former judgment attempted to be set up as *res judicata* is a non-final habeas corpus ruling. And it is the former judgment which is the point of focus when a *res judicata* question is raised. Petitioner's interest in being freed of parole restrictions stemming from an invalid sentence deserves as much weight when asserted in a declaratory action as when asserted by habeas corpus petition. Liberty is still at stake, even if the Court thinks that "custody" under 2241 is lacking.

Assuming that a declaratory judgment is available as a remedy for petitioner, there is no justification for dismissing the case and compelling him to file a new action. Such a disposition would be based solely on the ground that petitioner had chosen the wrong procedural route, or rather that the route chosen had become inappropriate because of facts occurring after suit was filed and through no fault of petitioner's. That archaic view has no place in the federal judiciary, especially when the constitutional claim of an indigent is involved.

Federal courts have long ago discarded rigid "theory of pleading" concepts, and the forms of action have been abolished. The spirit of federal practice today is to give a person whatever remedy he is entitled to under the law and the facts of his case. The procedural designation given the case is not controlling, and it is not even necessary that a party demand particular relief for the court to grant it. See Fed. R. Civ. P. 54(c). Habeas corpus is a civil action, *Riddle* v. *Dyche*, 262 U.S. 333, 336, as is a declaratory proceeding. In not going on to decide the case, the court below seriously departed from enlightened modern practice. This is underscored by 28 U.S.C. §2106 which directs any "court

of appellate jurisdiction" to make such disposition of the case "as may be just under the circumstances." And in doing this, supervening events are to be considered. *Patterson* v. *Alabama*, 294 U.S. 600, 607.

In *Miles* v. *Lovett*, 193 F. 2d 712, 713 (4th Cir. 1952) and *Girard* v. *Wilson*, 152 F. Supp. 21, 27 (D.D.C. 1957),[49] the courts expressly treated habeas corpus petitions as actions for declaratory judgments, since habeas corpus was found to be inappropriate under the facts of those cases. Doing this is in keeping with the spirit manifested by this Court when it said in a related context, "In behalf of the unfortunates, federal courts should act in doing justice if the record makes plain a right to relief." *United States* v. *Morgan*, 346 U.S. 502, 505.[50]

Similar procedural flexibility has also been indulged by this Court in analogous situations. In *Heflin* v. *United States*, 358 U.S. 415, 418, the Court indicated that where a federal prisoner is entitled to relief from an illegal sentence it was immaterial whether he moved under §2255 or Rule 35 of the Federal Rules of Criminal Procedure. Another relevant practice concerns original applications for habeas corpus in this Court. The Court usually denies them as such but then treats them as petitions for certiorari to review a decision below. *In re Shuttlesworth*, 369 U.S. 35;

---

[49] Reversed on other grounds, *sub nom. Wilson* v. *Girard*, 354 U.S. 524.

[50] It may be that relief is available to petitioner by writ of error *coram nobis* under 28 U.S.C. § 1651. This was recognized in *United States* v. *Morgan*, 346 U.S. 502, as a means of attacking a sentence for denial of the right to counsel where the petitioner was out of custody and hence could not bring habeas corpus. *Coram nobis* does not require custody. See also *Shelton* v. *United States*, 242 F.2d 101 (5th Cir. 1957); *Roberts* v. *United States*, 158 F.2d 150 (4th Cir. 1946). However, no federal *coram nobis* case has been located involving a state prisoner. While the writ might be so utilized it seems unnecessary to argue this since either habeas corpus or declaratory judgment affords petitioner a remedy.

Lotz v. Sacks, 368 U.S. 923. This is done in the interest of justice, without express provision for it in the Court's rules.

Thus on principle and authority there is no good reason to refuse relief to petitioner even if the court should conclude that habeas corpus is not the correct procedural pigeon hole. Petitioner is entitled to an adjudication on the merits of his constitutional claim, and the Declaratory Judgment Act provides the means for giving it to him.

Conclusion

For the reasons set forth, the judgment of the Court of Appeals should be reversed and the case remanded to that court with directions that the members of the Virginia Parole Board be made parties respondent and that the Court of Appeals proceed to decide the appeal either as a habeas corpus petition or declaratory judgment action.

Respectfully submitted,

F. D. G. Ribble
Daniel J. Meador
Counsel for Petitioner

Clark Hall
Charlottesville, Virginia

August, 1962

APPENDIX

CODE OF VIRGINIA:

§ 53-257. Parolees to comply with terms; furnishing copies.—Each parolee while on parole shall comply with such terms and conditions as may be prescribed by the Parole Board. When any prisoner is released on parole, the Director shall furnish such parolee, and the probation and parole officer having supervision of such parolee, a copy of the terms and conditions of the parole and any changes which may from time to time be made therein.

§ 53-258. Arrest and return of parolee to institution.—The Parole Board may at any time, in its discretion, upon information or a showing of a violation or a probable violation by any parolee of any of the terms or conditions upon which he was released on parole, issue, or cause to be issued, a warrant for the arrest and return of such parolee to the institution from which he was paroled, or to any other penal institution which may be designated by the Board. The Director may also at any time, in his discretion, upon information or a showing of a violation or probable violation by any parolee of any of the terms or conditions upon which such parolee was released on parole, issue, or cause to be issued, a warrant for the arrest and return of such parolee to the institution from which he was paroled, or to any other penal institution which may be designated by the Director. Each such warrant shall authorize all officers named therein to arrest and return such parolee to actual custody in the penal institution from which he was paroled, or to any other institution designated by the Parole Board or the Director, as the case may be.

§ 53-259. Arrest of parolee without warrant.—Any probation and parole officer may arrest a parolee without a warrant, or may deputize any other officer with power of arrest to do so, by a written statement setting forth that the parolee has, in the judgment of such probation and parole officer, violated one or more of the terms or conditions upon which such parolee was released on parole. Such a written

statement by a probation and parole officer delivered to the officer in charge of any State or local penal institution shall be sufficient warrant for the detention of the parolee.

§ 53-262. Revocation of parole; extension of terms and conditions of parole; further confinement.—Whenever any parolee is arrested and re-committed as hereinbefore provided, the Parole Board shall consider the case and act with reference thereto as soon as it may be conveniently possible. The Board, in its discretion, may revoke the parole and order the reincarceration of the prisoner for the unserved portion of the term of imprisonment originally imposed upon him, or it may reinstate the parole either upon such terms and conditions as were originally prescribed or as may be prescribed in addition thereto or in lieu thereof.

§ 53-264. Release of prisoner subject to parole.—The Director of the Department of Welfare and Institutions shall release, or cause to be released, into the custody of the Parole Board or any of its probation and parole officers or the Director of Parole, any prisoner subject to parole under the laws of this State whenever directed so to do by the Parole Board or by the Director of Parole.

UNIFORM ACT FOR OUT-OF-STATE PAROLEE SUPERVISION
VA. CODE, § 53-289; GA. CODE, § 27-2701a.

The form of the compact shall be substantially as follows:

A compact entered into by and among the contracting states, signatures hereto, with the consent of the Congress of the United States of America, granted by an act entitled "an act granting the consent of Congress to any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and for other purposes."

The contracting States solemnly agree:

(1) That it shall be competent for the duly constituted judicial and administrative authorities of a State party to this compact (herein called "sending State"), to permit any person convicted of an offense within such State and

placed on probation or released on parole to reside in any other State party to this compact (herein called "receiving State"), while on probation or parole, if

(a) Such person is in fact a resident of or has his family residing within the receiving State and can obtain employment there;

(b) Though not a resident of the receiving State and not having his family residing there, the receiving State consents to such person being sent there.

Before granting such permission, opportunity shall be granted to the receiving State to investigate the home and prospective employment of such person.

A resident of the receiving State, within the meaning of this compact, is one who has been an actual inhabitant of such State continuously for more than one year prior to his coming to the sending State and has not resided within the sending State more than six continuous months immediately preceding the commission of the offense for which he has been convicted.

(2) That each receiving State will assume the duties of visitation of and supervision over probationers or parolees of any sending State and in the exercise of those duties will be governed by the same standards that prevail for its own probationers and parolees.

(3) That duly accredited officers of a sending State may at all times enter a receiving State and there apprehend and retake any person on probation or parole. For that purpose no formalities will be required other than establishing the authority of the officer and the identity of the person to be retaken. All legal requirements to obtain extradition of fugitives from justice are hereby expressly waived on the part of States party hereto, as to such persons. The decision of the sending State to retake a person on probation or parole shall be conclusive upon and not reviewable within the receiving State: Provided, however, that if at the time when a State seeks to retake a probationer or parolee there should be pending against him within the receiving State any criminal charge, or he should be suspected of having committed within such State

a criminal offense, he shall not be retaken without the consent of the receiving State until discharged from prosecution or from imprisonment for such offense.

(4) That the duly accredited officers of the sending State will be permitted to transport prisoners being retaken through any and all States parties to this compact, without interference.

(5) That the Governor of each State may designate an officer who, acting jointly with like officers of other contracting States, if and when appointed, shall promulgate such rules and regulations as may be deemed necessary to more effectively carry out the terms of this compact.

(6) That this compact shall become operative immediately upon its execution by any State as between it and any other State or States so executing. When executed it shall have the full force and effect of law within such State, the form of execution to be in accordance with the laws of the executing State.

(7) That this compact shall continue in force and remain binding upon each executing State until renounced by it. The duties and obligations hereunder of a renouncing State shall continue as to parolees or probationers residing therein at the time of withdrawal until retaken or finally discharged by the sending State. Renunciation of this compact shall be by the same authority which executed it, by sending six months' notice in writing of its intention to withdraw from the compact to the other States party hereto.

FILE COPY

In the

Supreme Court of the United States

October Term, 1962

No. 77

JOHN R. JONES,

Petitioner

v.

W. K. CUNNINGHAM, JR., SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY,

Respondent

BRIEF AND APPENDIX ON BEHALF OF THE RESPONDENT

ROBERT Y. BUTTON
Attorney General of Virginia

RENO S. HARP, III
Assistant Attorney General

Supreme Court–State Library Building
Richmond 19, Virginia

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

In the

Supreme Court of the United States

October Term, 1962

No. 77

JOHN R. JONES,

Petitioner

v.

W. K. CUNNINGHAM, JR., SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY,

Respondent

BRIEF ON BEHALF OF THE RESPONDENT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit dismissing the appeal as moot (R. 24-33), is reported at 294 F. 2d 608. The opinion of the United States District Court for the Eastern District of Virginia, Richmond Division, of March 29, 1961 (R. 12-13), is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on September 14, 1961 (R. 34). The petition for a writ of certiorari was filed on October 26, 1961, and the respondent's Response thereto

was filed on February 14, 1962. Certiorari was granted on March 5, 1962 (R. 35). Petitioner asserts that the jurisdiction of this Court is founded upon 28 U. S. C., §1254(1).

STATUTES INVOLVED

The following provisions of the Code of Virginia will be found in the Appendix: §§53-251, 53-253, 53-255, 53-257, 53-258, 53-259, 53-262, 53-263, 53-264, 53-296, and 53-289 (Uniform Act for Out-of-State Parolee Supervision, Georgia Code §27-2701a). In addition, 28 U. S. C., §2241 and 28 U. S. C., §2254, together with Rule 49(1) of the Rules of the Supreme Court of the United States, and Rule 25(1) of the Rules of the United States Court of Appeals for the Fourth Circuit will also be found in the Appendix.

QUESTIONS PRESENTED

1. Is the petitioner's appeal of an adverse decision in a habeas corpus proceeding rendered moot by virtue of his discharge on parole without the jurisdiction of the District Court?

2. Should this Court direct that the United States Court of Appeals consider the proceeding as an action for a declaratory judgment?

STATEMENT OF THE CASE

On February 2, 1961, John R. Jones (hereinafter called petitioner) filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Virginia, Richmond Division (R. 1-8). On March 1, 1961, respondent filed a Return (R. 9-10). Petitioner attacked the validity of a judgment of the Circuit Court of the City of Richmond, Virginia, of November 18, 1953, wherein petitioner had been ordered to serve ten years in the Virginia State Penitentiary, having been found to be a third-time

offender (see §53-296, Code of Virginia). Petitioner specifically attacked a conviction imposed upon him in the Circuit Court of Chesterfield County, Virginia, on July 8, 1946, for larceny of an automobile. This conviction was one of the three convictions which formed the basis for petitioner's recidivist sentence.

Petitioner alleged that his Chesterfield County conviction (eighteen months in the Penitentiary) was void on the ground that he was not advised of his right to counsel; that he did not waive his right to counsel; that he was financially unable to employ counsel, and that he entered a plea of guilty after a conference with the Commonwealth's Attorney and an FBI agent. It was agreed between the parties present at the conference that certain Federal charges would be dropped, and that a light sentence would be recommended to the Court.

Respondent's Return (R. 9-10) established that, on February 28, 1958, a hearing was held on a similar petition filed by the petitioner in the Circuit Court of Chesterfield County, Virginia, and that the petition was denied and dismissed on August 27, 1958. Respondent attached to his Return a copy of the transcript of the proceedings in the Circuit Court of Chesterfield County, Virginia (Respondent's Exhibit III). An examination of the transcript will reveal that petitioner's uncle was present with him in court on July 8, 1946; that petitioner freely and voluntarily admitted his guilt; entered a plea of guilty and was quite pleased with the light sentence imposed upon him.

The District Court, in a brief opinion (R. 12-13), dismissed the petition on March 29, 1961. On April 6, 1961, the District Judge denied a certificate of probable cause (R. 16). On April 11, 1961, an order was entered in the United States Court of Appeals for the Fourth Circuit granting the certificate of probable cause and permitting petitioner to

proceed in forma pauperis. On April 14, 1961, two eminent attorneys were appointed to represent petitioner.

On June 15, 1962, counsel for the respondent was advised by the Director of the Bureau of Records and Criminal Identification of the Virginia State Penitentiary that the Virginia Parole Board had determined that petitioner was a fit subject for parole. Counsel was further advised that the Parole Board had approved a job offered petitioner and the place where he intended to live, and that petitioner would be released on June 26, 1961, if he accepted the conditions of parole. Counsel immediately notified petitioner's court-appointed attorneys by telephone of this situation. On the following day, June 16, 1962, counsel notified petitioner's attorneys by letter that if petitioner accepted the parole a motion to dismiss the appeal would be filed. Counsel sent a copy of the foregoing communication to the Chief Judge of the United States Court of Appeals for the Fourth Circuit.

On June 22, 1962, counsel for respondent filed a motion to dismiss the appeal on the ground that it would become moot on June 26, 1961, the day on which petitioner would be released from custody (R. 19). The parole agreement will be found in the record on pages 20-21.

This case came on to be heard on June 23, 1962, at which time the motion was argued and counsel were directed to submit memoranda of law in connection with the motion to dismiss. On June 26, 1961, petitioner was paroled, as provided in the parole agreement and went directly to Lafayette, Georgia, to live with his aunt and uncle. Petitioner was to be supervised by the Georgia Parole authorities as provided for by the Uniform Act for Out-of-State Parolee Supervision (§53-289, Code of Virginia; §27-2701a of the Code of Georgia).

On July 3, 1961, petitioner, by counsel, filed a motion to add the members of the Virginia Parole Board as parties

respondent (R. 23). On September 14, 1961, the United States Court of Appeals dismissed the appeal as moot (R. 24-33).

ARGUMENT

I.

Petitioner's Appeal of an Adverse Decision in a Habeas Corpus Proceeding Was Rendered Moot by Virtue of His Discharge on Parole Without the Jurisdiction of the District Court.

Let us examine the history, purpose and scope of the writ of habeas corpus ad subjiciendum which petitioner seeks in this case. Early in the history of the recorded jurisprudence in this country, Chief Justice Marshall, speaking for the Court in *Ex Parte Bollman*, 4 Cranch, 75, 101, observed:

> "It has been demonstrated at the bar, that the question brought forward on a habeas corpus, is always distinct from that which is involved in the cause itself. The question whether the individual shall be imprisoned is always distinct from the question whether he shall be convicted or acquitted of the charge on which he is to be tried, and, therefore, these questions are separated, and may be decided in different courts." (4 Cranch 101)

In view of the above language, it would seem that as a necessary prerequisite to the filing of a petition for a writ of habeas corpus ad subjiciendum, the petitioner must demonstrate that he is imprisoned. Moreover, the history of the Great Writ was outlined briefly by Mr. Justice Bradley in *Ex Parte Parks*, 93 U. S. 18, 21:

> "The general principles upon which the writ of *habeas corpus* is issued in England were well settled by usage and statutes long before the period of our

national independence, and must have been in the mind of Congress when the power to issue the writ was given to the courts and judges of the United States. These principles, subject to the limitations imposed by the Federal Constitution and laws, are to be referred to for our guidance on the subject. A brief reference to the principal authorities will suffice on this occasion.

"Lord Coke, before the *Habeas Corpus* Act was passed, excepted from the privilege of the writ persons imprisoned upon conviction for a crime, or in execution. 2 Inst., 52; Com. Dig., *Hab. Corp.*, B.

"The *Habeas Corpus* Act itself excepts those committed or detained for treason or felony plainly expressed in the warrant, and persons convict, or in execution by legal process. Com. Dig., *Hab. Corp.*, B.

"Lord Hale says: 'If it appear by the return of the writ that the party be wrongfully committed, or by one that hath not jurisdiction, or for a cause for which a man ought not to be imprisoned, he shall be discharged or bailed.' 2 Hale, H. P. C., 144.

"Chief Baron Gilbert says: 'If the commitment be against law, as being made by one who had no jurisdiction of the cause, or of a matter for which by law no man ought to be punished, the court are to discharge.' Bac. Abr., *Hab. Corp.*, B. 10.

"These extracts are sufficient to show that, when a person is convict or in execution by legal process issued by a court of competent jurisdiction, no relief can be had. Of course, a superior court will interfere if the inferior court had exceeded its jurisdiction, or was not competent to act." (93 U. S. 21)

In view of the foregoing, it is obvious that the purpose of the writ of habeas corpus is to test the validity of petitioner's imprisonment, commitment or detention by way of legal process. The applicable provision of Federal statute, upon which the jurisdiction of the District Court rests, is codified as 28 U. S. C., §2241, which provides that the

District Court is vested with jurisdiction to issue the writ of habeas corpus within its jurisdiction. It is well settled that the writ of habeas corpus lies only to determine the validity of the petitioner's present detention. *McNally* v. *Hill*, 293 U. S. 131. This language from the Court's opinion is pertinent herein:

> "The purpose of the proceeding defined by the statute was to inquire into the legality of the detention, and the only judicial relief authorized was the discharge of the prisoner or his admission to bail, and that only if his detention were found to be unlawful. In this, the statute conformed to the traditional form of the writ, which put in issue only the disposition of the custody of the prisoner according to law. There is no warrant in either the statute or the writ for its use to invoke judicial determination of questions which could not affect the lawfulness of the custody and detention, and no suggestion of such a use has been found in the commentaries on the English common law. * * * ." (293 U. S. 136-137)

The function of the Great Writ is succinctly stated in the cited case in footnote 2, and the same is set forth below for the reason that it is particularly appropriate to the case at bar:

> "'The writ, in its historic form, like that now in use in the Federal courts, was directed to the disposition of the custody of the prisoner. It commanded the officer to 'have the body' of him 'detained in our prison under your custody,' 'together with the day and cause of his being taken and detained,' before the judge at a specified time and place 'to do and receive all and singular those things which our said chief justice shall then and there consider of him in this behalf.' 1 Richardson, The Attorney's Practice in the Court of Kings Bench, p.

369. Numerous writs, in substantially the same form, used between 5 Edw. IV. and James II., are collected in Tremaine, Pleas of the Crown, 351-435. The earliest of these is reprinted in Coke's Second Institutes, 53. And see Hurd, Habeas Corpus, 232, 233." (293 U. S. 137)

From a review of the foregoing authorities it can only be concluded that in order for the writ of habeas corpus to lie in a Federal court, the Court must have jurisdiction over the petitioner and the respondent, and that the petitioner must be incarcerated.[1]

Petitioner, in his brief, has argued that historically the Great Writ lies to test the validity of any type of restraint. Petitioner fails to cite one decision of this Court involving a State prisoner who has been paroled in support of his argument.[2]

---

[1] Petitioner quotes this language from *Irvin* v. *Dowd*, 359 U. S. 394, 404, on page 10 of his brief: "Although the statute has been re-enacted with minor changes at various times the sweep of the jurisdiction granted by these broad phrases has remained unchanged." The Court is referring to § 2241 of Title 28 U. S. C. It is noted that the cited case dealt with the principle of exhaustion of State remedies; that the above quotation is lifted entirely out of context, and that no reference will be found herein to the question of custody, incarceration or detention.

[2] It is noted that the quotation on page 13 of petitioner's brief is incomplete and the entire sentence is set forth below:

> "The purpose of the writ of habeas corpus is to test the right of the court, or other body issuing the writ of arrest, to detain the person for any purpose; and the detention it seems, is sufficient, if it restrain the party of his right to go without question, or, as stated in the English case, cited in Taylor v. Taintor, without a string upon his liberty." *Mackenzie* v. *Barrett*, 141 F. 964, 966).

Taylor v. *Taintor*, 16 Wall. 366, cited above, was a suit for the return of certain monies forfeited to the State of Connecticut, and did not involve the question of the status of the State parolee in a habeas corpus proceeding.

As shown by the cases heretofore presented to this Court for its consideration, the purpose of the ancient writ of habeas corpus is to prevent the illegal imprisonment of any person, and may issue only when the petitioner is in the physical custody of the person to whom the writ is directed (see III Blackstone's Commentaries, page 129 et seq. (First Edition 1768)). Petitioner premises his entire argument upon the proposition that any restraint beyond that imposed upon civilized society as a whole is sufficient to support an inquiry by way of habeas corpus (see page 14 of petitioner's brief). A careful reading of the first portion of petitioner's argument (pp. 8 through 14 of his brief) fails to disclose one case in support of this theory.

Let us examine the relationship between the petitioner, John R. Jones, now at large in the State of Georgia, and the respondent, W. K. Cunningham, Jr., Superintendent of the Virginia State Penitentiary, at Richmond, Virginia. Petitioner was in the custody of the respondent until June 26, 1961. On that day he was released from the custody of the Superintendent by order of the Virginia Parole Board, as provided for in § 53-264 of the Code. Petitioner was then released from custody and permitted to go to Lafayette, Georgia, as provided for by his parole conditions. The respondent, the Superintendent of the Virginia State Penitentiary at Richmond, has no authority over the petitioner.

If the issues in this case are not moot, as suggested by the petitioner, then what action could the District Court take with reference to W. K. Cunningham, Jr., Superintendent of the Virginia State Penitentiary? Assuming for purposes of argument that the Fourth Circuit had determined that petitioner was entitled to his immediate release from the Virginia State Penitentiary, the Court would have reversed the District Court and issued its mandate. Upon receipt of

the mandate, the District Court would then have issued its order directing that Cunningham release the petitioner. When the order was served upon Cunningham, the most he could have done would have been to put it in his files, for petitioner was no longer in his custody. In essence, the only action which the Court below could have taken would have been to render an advisory opinion. It has long been recognized that courts will not act where there is no subject matter on which the judgment of the court can operate. *Ex Parte Baez*, 177 U. S. 378, 390.

Since petitioner is no longer incarcerated by virtue of the authority of the respondent, what is the petitioner's status today? The Virginia Parole Board is authorized by §53-238(2) of the Code of Virginia to place convicted felons on parole. As hereinbefore explained, §53-264 of the Code of Virginia provides that a person subject to parole shall be released into the custody of the Virginia Parole Board whenever directed by the Parole Board. The parolee is required to comply with the terms of his parole (§53-257 of the Code of Virginia), and is furnished with a copy of the same (R. 20-22). In this case the petitioner has been paroled to the State of Georgia under the terms of the Uniform Act for Out-of-State Parolee Supervision (§53-289, Code of Virginia; §27-2701a, Code of Georgia). Petitioner is presently supervised by Frank Clayton, Parole Supervisor, Chatsworth, Georgia.

Petitioner argues that the conditions of parole are of such character as to constitute a severe restraint upon him and to place him in the category of persons who may seek relief by way of habeas corpus. Petitioner is admittedly under certain restrictions, but it would seem that his counsel have painted a very dark picture of his situation. Indeed, the interpretation placed upon the conditions of parole in

petitioner's brief is not only illogical, but somewhat incorrect (petitioner's brief, page 15). Petitioner does not need his parole officer's permission to leave the physical limits of the Town of Lafayette, Georgia. Petitioner is restricted to the community, which includes the surrounding area. Moreover, if petitioner has a good reason for any request which he submits to his parole officer, the same will be granted.[3]

It is submitted that the views expressed in petitioner's brief on this point are unrealistic and premised upon a lack of understanding of the parole system. It is assumed that petitioner will not get into any difficulty and will in due course be released from supervision.[4]

Moreover, should petitioner conduct himself in such a manner that he would be arrested as a parole violator, his parole would not be revoked without a hearing. In addition, petitioner's attorney could appear before the Parole Board and present such evidence as he sees fit. Prior to the decision of the United States Court of Appeals for the District of Columbia in *Glenn* v. *Reed*, 289 F. 2d 462, it was apparently not the practice in the Federal system to permit attorneys to appear at parole revocation hearings in Federal system.

Petitioner cites the following cases on pages 16 and 17 of his brief: *United States* v. *Dillard*, 102 F. 2d 94; *Escoe* v. *Zerbst*, 295 U. S. 490; *Washington* v. *Hagan*, 287 F. 2d 332; *Martin* v. *United States Board of Parole*, 199 F. Supp. 542. The foregoing cases are not applicable herein for the reason that they do not deal with the Virginia statutes. A determination of the meaning of the Virginia law on the subject is a prerequisite to a decision in the premises. We

---

[3] Petitioner has changed jobs, and is presently employed by the Barwick Mills, Lafayette, Georgia.

[4] An examination of the reports filed by the Georgia parole officer indicates that petitioner has been making good progress to date, and that he has not been in any difficulty.

are not here concerned with interpretations placed upon the Federal statutes by the Federal courts. In addition, the hypothetical situation described on page 18 of petitioner's brief is so outlandish that perhaps it should be ignored. It would seem, however, that the foregoing hypothetical situation typifies petitioner's counsel's misunderstanding of the purpose of parole. Parole, in their view, is a situation wherein the parolee is watched like a hawk by his parole supervisor, who will have him clapped into jail should he deviate even the slightest bit from his parole conditions. This is not the true situation at all. The Parole Board's view of the status of a parolee is expressed in the order of release, and we quote the terminal paragraph thereof:

> "The Parole Board has released you on parole because it believes that you will be sincere in your efforts to live up to the above conditions and thus benefit yourself as well as the community."

The foregoing is the true view of the status of a parolee.

Having clarified the actualities of petitioner's parole, let us examine the legal aspects. Petitioner was released into the custody of the Virginia Parole Board on June 26, 1961, and he was then released from custody. In the eyes of the Parole Board petitioner is no longer in custody. Petitioner is now in Georgia, in conformity with his conditions of parole. Petitioner cites five cases on page 19 of his brief, which he says are in conflict with the decision of the United States Court of Appeals for the Fourth Circuit in the case at bar. Counsel have refrained from an extensive discussion of each case cited in petitioner's brief, for a careful analysis of each of the 113 cases contained therein would not only overburden the body of this brief, but would confuse the

issue even more. Respondent believes, however, that the following cases can be briefly distinguished from the case at bar:

1. *United States* v. *Fay*, 289 F. 2d 470.

Petitioner was serving a recidivist sentence in the New York penal system, and while his appeal was pending to the Second Circuit Court of Appeals, he was paroled, as provided for in §213 of Chapter 43, McKinney's Consolidated Laws of New York, which reads as follows:

> "No prisoner shall be released on parole merely as a reward for good conduct or efficient performance of duties assigned in prison, but only if the board of parole is of opinion that there is reasonable probability that, if such prisoner is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society. If the board of parole shall so determine, such prisoner shall be allowed to go upon parole outside of prison walls and inclosure upon such terms and conditions as the board shall prescribe, but to remain while thus on parole in the legal custody of the warden of the prison from which he is paroled, until the expiration of the maximum term specified in his sentence. As amended L. 1932, c. 457, eff. March 6, 1936."

The Court's decision that petitioner was in custody and that the habeas corpus appeal was not moot, was based on and controlled by the above-quoted statute, which provides that a parolee remains in the legal custody of the warden. There is no such Virginia statute.

2. *United States* v. *Bradford*, 194 F. 2d 197.

This was a proceeding under 28 U. S. C., §2255 and, of

course, such a proceeding is entirely different from a habeas corpus action brought by a State prisoner.

3. *United States* v. *Brilliant*, 274 F. 2d 618.

This was also a proceeding brought under 28 U. S. C., §2255. The Court held that although the petitioner had been paroled, he was still in the custody of the Attorney General of the United States, as provided for by 18 U. S. C., §4203, which reads in part as follows:

> "Such parolee shall be allowed in the discretion of the Board, to return to his home, or to go elsewhere, upon such terms and conditions, including personal reports from such paroled person, as the Board shall prescribe, and to remain, while on parole, in the legal custody and under the control of the Attorney General, until the expiration of the maximum term or terms for which he was sentenced."

4. *Egan* v. *Teets*, 251 F. 2d 571.

During the pendency of the appeal petitioner was paroled. The Ninth Circuit Court of Appeals held that it had jurisdiction to determine the issues and cited *Dickson* v. *Castle*, 244 F. 2d 665, which will be hereinafter discussed.

5. *Dickson* v. *Castle*, 244 F. 2d 665.

Petitioner, a California prisoner, was unconditionally released during the time the appeal was pending. The Ninth Circuit Court of Appeals held, under *Pollard* v. *United States*, 352 U. S. 354, that the appeal was not moot. It is important to note that *Pollard* involved a Federal prisoner who brought a proceeding under 28 U. S. C., §2255, which, of course, is not applicable to state prisoners.

From the very brief resume of the foregoing cases it can

be seen that they are not in conflict with the decision of the court below in the instant case. The following decisions of other circuits are in accord with that of the court below:

Johnson v. *Eckle*, 269 F. 2d 836.
United States v. *Ragen*, 241 F. 2d 126.
United States v. *Cummings*, 233 F. 2d 187.
Siercovich v. *McDonald*, 193 F. 2d 118.
Adams v. *Hiatt*, 173 F. 2d 896.
Factor v. *Fox*, 175 F. 2d 626.
VanMeter v. *Sanford*, 99 F. 2d 511.
Whiting v. *Chew*, 273 F. 2d 885.

Petitioner also cites several decisions of the courts of California and Florida in support of his argument that a parolee is in custody and can attack the validity of the sentence from which he has been released on parole. It is noted that the California statute in effect at the time of these decisions (see page 21 of petitioner's brief) provided that a parolee is in the legal custody of the State Board of Prison Directors (California Penal Code, §3056).

The Supreme Court of Florida has held that the writ will lie even though the petitioner is on parole, although there is no statutory authority to support the court's holding (*Sellers* v. *Bridges*, 153 Fla. 586, 15 So. 2d 293).

The Federal cases listed on page 22 of petitioner's brief in support of the theory that parole is a continuation of custody are, of course, based upon the provisions of 18 U. S. C., §4203 which provides that the parolee remain in the custody of the Attorney General of the United States. For this reason, the cited cases are not pertinent to this inquiry which deals with the parole of a Virginia prisoner under Virginia law.

The fact that some Federal and State courts have held that a prisoner on parole may attack the validity of his com-

mitment is clearly not of importance to the case at bar. The decisions of State courts, cited on pages 25 and 26 of petitioner's brief on this point, are on their facts distinguishable from the case at bar.

It has long been recognized that habeas corpus is an appropriate method for a member of the armed forces to attack the validity of his servitude. Petitioner has cited numerous cases on pages 26 and 27 dealing with such proceedings. These cases are also distinguishable on their facts from the case at bar. There is no comparison between conditions placed on a parolee and the severe restrictions imposed upon a member of the armed forces. A soldier's life is completely controlled by the military authorities. They direct that he wear certain types of clothes; that he arise from his bed at a certain hour; that he live in a certain place and completely control his movements. A soldier is restricted to his base and may not leave unless he receives a pass. A parolee suffers no such restrictions. A soldier's status is one of complete control by military authority, while a parolee's status is predominately one of liberty. There is obviously no comparison between the status of a parolee and the servitude of a slave or indentured servant and, consequently, the cases cited by petitioner dealing with such persons are irrelevant. The cases cited by petitioner deal with aliens and are based on the historical concept of restraint, and require that the person detaining the petitioner produce the body before the court. This is the purpose of the Great Writ.

Up to this point in our argument, we have attempted to distinguish the multitude of citations offered by petitioner in his brief. We shall now bring to the Court's attention those cases which we feel are pertinent, relevant and controlling in the case at bar.

We rely on the decision of this Court in *Weber* v. *Squier*, 315 U. S. 810, and the per curiam opinion is set forth below:

> "The petition for writ of certiorari is denied on the ground that the cause is moot, it appearing that petitioner has been released upon order of the United States Board of Parole and that he is no longer in the respondent's custody. The motion for leave to proceed further herein in forma pauperis is, therefore, also denied."

The following opinions of this Court are controlling herein and because of their brevity, they are set forth in full below:

United States v. *Downer*, 322 U. S. 756.

"Denied on the ground that the case is moot, it appearing that petitioner is no longer in respondent's custody. *United States, ex rel. Innes* v. *Crystal*, 319 U. S. 755."

Zimmerman v. *Walker*, 319 U. S. 744.

"Denied on the ground that the cause is moot, it appearing that Hans Zimmerman on whose behalf the petition is filed has been released from the respondent's custody."

United States v. *Crystal*, 319 U. S. 755.

"The petition for writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is denied on the ground that the cause is moot, it appearing that petitioner no longer is in respondent's custody."

Tornello v. *Hudspeth*, 318 U. S. 792.

"The motion for leave to proceed in forma pauperis is granted. The petition for certiorari to the United

States Circuit Court of Appeals for the Tenth Circuit is denied on the ground that the case is moot, it appearing that petitioner has been pardoned by the President and that he is not longer in respondent's custody."

An examination of the foregoing opinions of this Court establishes conclusively that a habeas corpus proceeding is rendered moot by the discharge of the petitioner from the respondent's custody. These cases are controlling in the case at bar for the reason that the petitioner has in fact been discharged from the respondent's custody, and this fact is admitted in petitioner's brief.

The most recent decision of this Court which reaffirms the foregoing principle is *Parker* v. *Ellis*, 362 U. S. 574, and a portion of that opinion is set forth below:

"Before the case could come to be heard here, the petitioner was released from the state prison after having served his sentence with time off for good behavior. The case has thus become moot, and the Court is without jurisdiction to deal with the merits of petitioner's claim. 'The purpose of the proceeding defined by statute [authorizing the writ of habeas corpus to be issued] was to inquire into the legality of the detention, and the only judicial relief authorized was the discharge of the prisoner or his admission to bail.' McNally v. Hill, 293 US 131, 136, 79 L. ed 238, 242, 55 S. Ct 24. 'Without restraint of liberty, the writ will not issue.' Id., 293 US 138. See also Johnson v. Hoy, 227 US 245, 57 L. ed 497, 33 S Ct 240. 'It is well settled that this court will not proceed to adjudication where there is no subject matter on which the judgment of the court can operate.' Ex parte Baez, 177 US 378, 390, 44 L ed 813, 817, 20 S Ct 673. We have applied these principles to deny the writ of certiorari for mootness on the express ground that petitioner was no longer in respondent's custody in at least

three cases not relevantly different from the present one. Weber v. Squier, 315 US 810, 86 L ed 1209, 62 S Ct 800; Tornello v. Hudspeth, 318 US 792, 87 L ed 1158, 63 S Ct 990; Zimmerman v. Walker, 319 US 744, 87 L ed 1700, 63 S Ct 1027. In all these cases there was custody as the basis for habeas corpus jurisdiction until the cases reached here. In Weber, the respondent's custody ceased because the petitioner had received the benefits of the United States Parole Act. In Tornello the petitioner had been pardoned, and was no longer in the custody of anyone. In Zimmerman petitioner had been unconditionally released and was also no longer in the custody of anyone. These cases demonstrate that it is a condition upon this Court's jurisdiction to adjudicate an application for habeas corpus that the petitioner be in custody when that jurisdiction can become effective.

"It is precisely because a denial of a petition for certiorari without more has no significance as a ruling that an explicit statement of the reason for a denial means what it says. Accordingly, the writ of certiorari is dismissed for want of jurisdiction." (362 U. S. 575-576)

The foregoing constitutes a succinct statement of the law applicable to the case at bar and it would serve no useful purpose to elaborate on the same.

One matter presented in petitioner's brief demands a few short comments. It has been clearly established that petitioner is not in respondent's custody and, consequently the writ will not lie. It is argued in petitioner's brief that if the Virginia Parole Board were made parties respondent, the Court could then adjudicate the matter. Assuming for purposes of argument that the members of the Parole Board were made parties respondent. If the case were remanded to the Fourth Circuit directing that the District Court

conduct a hearing, under what stretch of the imagination could the Parole Board be required to produce the petitioner for a hearing? Do counsel for the petitioner suggest that the Parole Board should have petitioner arrested and brought to Virginia for a habeas corpus hearing? This is, of course, absurd. It is true that the Parole Board could have petitioner arrested in Georgia and brought to Virginia, but petitioner has a right to contest the validity of his confinement as soon as he reaches Virginia (*United States* v. *Lohman*, 228 F. 2d 824). The foregoing is purely speculative and is of little import here.

It is well settled that the petitioner and the respondent must be within the jurisdiction of the District Court. *Ahrens* v. *Clark*, 335 U. S. 188, 190-191; *Johnson* v. *Eisentrager*, 339 U. S. 763, 778. Petitioner is not within the jurisdiction of the United States District Court for the Eastern District of Virginia, Richmond Division, and, consequently, the writ will not lie.

A subsidiary question, which is treated very lightly in petitioner's brief, deserves comment. On page 37 of his brief reference is made to Supreme Court Rule 49(1) and to United States Court of Appeals for the Fourth Circuit Rule 25(1). Both of these rules provide that the custody of the prisoners shall not be disturbed pending an appeal in a habeas corpus matter. Counsel for the respondent was not advised of these rules until after petitioner had been released from custody. It would seem that the purpose of these rules is to prevent the transfer of a prisoner without the jurisdiction of the District Court, and not to prevent his release from custody. It is obvious that it is not the intention of these rules to require that a prisoner remain in custody if he is eligible for parole and has been granted parole by the appropriate authorities. Moreover, the release of the petitioner from the custody of the respondent renders

this matter moot by the very language of the rule of this Court and of the Fourth Circuit Court of Appeals.[5]

In summary it is submitted that petitioner has been released from the custody of the respondent; that his status as a parolee does not entitle him to proceed by way of habeas corpus; that petitioner's status is one of freedom, rather than confinement, and that, under the decisions of this Court, the case is moot.

II.

This Case Cannot Be Treated as a Declaratory Judgment Action

On March 5, 1962, this Court entered the following order, which is set forth in its entirety below:

"Order Granting Motion for Leave to Proceed in Forma Pauperis and Granting Petition for Writ of Certiorari—March 5, 1962

"On Petition For Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

"*On consideration* of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to the question of 'mootness.' The case is transferred to the appellate docket as No. 766 and placed on the summary calendar.

"And it is further ordered that the duly certified copy of the transcript of the proceedings below which ac-

[5] Petitioner says on page 23 of his brief "To allow the State thereby to immunize the sentence from constitutional attack runs counter to common sense and the spirit of habeas corpus." Petitioner has never suggested that the officials of the Parole Board sought to prevent him from attacking the validity of his sentence. Indeed, the Parole Board had no knowledge of his habeas corpus proceeding until after the parole had been granted. To follow petitioner's suggestion, as quoted above, would serve only to further crowd the dockets of the courts.

companied the petition shall be treated as though filed in response to such writ."

In view of the language of this Court's order, counsel feel that it would be improper to make any argument on the second point raised in the petitioner's brief, for the reason that the Court has limited the issue in this case to the question of mootness. We would observe, however, that, in order to maintain a declaratory judgment action, it is necessary that there be an actual controversy between the parties. Counsel for the respondent are not advised that the petitioner himself is in any way objecting to his present situation.

CONCLUSION

"Law Addresses Itself to Actualities."[6]

The foregoing is appropriate herein as a succinct statement of respondent's position in the premises. The actualities of the situation control the decision herein and not the theoretical abstractions presented by petitioner.

For the reasons stated, it is submitted that this cause is moot and that the judgment of the United States Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

ROBERT Y. BUTTON
Attorney General of Virginia

RENO S. HARP, III
Assistant Attorney General

Supreme Court–State Library Building
Richmond 19, Virginia

[6] *Griffin* v. *Illinois*, 351 U. S. 12, 23 (concurring opinion).

§53-251. Eligibility for parole.—(1) Except as herein otherwise provided, every person convicted of a felony, and sentenced and committed, under the laws of this Commonwealth to the State Penitentiary, the State Penitentiary Farm, the State Industrial Farm for Women, or the Southampton Penitentiary Farm, or any of the State convict road camps, and any subsidiary institution, if a part of the major penal system, shall be eligible for parole after serving one-fourth of the term of imprisonment imposed, or after serving twelve consecutive years of the term of imprisonment imposed if one-fourth of the term of imprisonment imposed is more than twelve years. In case of terms of imprisonment to be served consecutively, the total time imposed shall constitute the term of the imprisonment; in the case of terms of imprisonment to be served concurrently, the longest term imposed shall be the term of imprisonment.

§53-253. Thorough investigation prior to release.—No person shall be released on parole by the Parole Board until it has made, or caused to be made, a thorough investigation as to the history, the physical and mental condition, and the character of the prisoner and his conduct, employment and attitude while in prison, nor until the Parole Board has determined that his release on parole will be compatible with the interests of the prisoner and of society.

§53-255. Period of parole.—The period of parole which shall be fixed by the Board may be greater than the unserved portion of the sentence actually imposed upon the paroled prisoner by the court or jury which fixed his sentence, but it shall not exceed the difference between the time served in confinement by the paroled prisoner and the maximum term established by law as punishment for the offense or offenses of which the prisoner was convicted.

§53-257. Parolees to comply with terms; furnishing copies.—Each parolee while on parole shall comply with such terms and conditions as may be prescribed by the Parole Board. When any prisoner is released on parole, the Director shall furnish such parolee, and the probation and parole officer having supervision of such parolee, a copy of the terms and conditions of the parole and any changes which may from time to time be made therein.

§53-258. Arrest and return of parolee to institution.—The Parole Board may at any time, in its discretion, upon information or a showing of a violation or a probable violation by any parolee of any of the terms or conditions upon which he was released on parole, issue, or cause to be issued, a warrant for the arrest and return of such parolee to the institution from which he was paroled, or to any other penal institution which may be designated by the Board. The Director may also at any time, in his discretion, upon information or a showing of a violation or probable violation by any parolee of any of the terms or conditions upon which such parolee was released on parole, issue, or cause to be issued, a warrant for the arrest and return of such parolee to the institution from which he was paroled, or to any other penal institution which may be designated by the Director. Each such warrant shall authorize all officers named therein to arrest and return such parolee to actual custody in the penal institution from which he was paroled, or to any other institution designated by the Parole Board or the Director, as the case may be.

§53-259. Arrest of parolee without warrant.—Any probation and parole officer may arrest a parolee without a warrant, or may deputize any other officer with power of arrest to do so, by a written statement setting forth that the

parolee has, in the judgment of such probation and parole officer, violated one or more of the terms or conditions upon which such parolee was released on parole. Such a written statement by a probation and parole officer delivered to the officer in charge of any State or local penal institution shall be sufficient warrant for the detention of the parolee.

§53-262. Revocation of parole; extension of terms and conditions of parole; further confinement.—Whenever any parolee is arrested and recommitted as hereinbefore provided, the Parole Board shall consider the case and act with reference thereto as soon as it may be conveniently possible. The Board, in its discretion, may revoke the parole and order the reincarceration of the prisoner for the unserved portion of the term of imprisonment originally imposed upon him, or it may reinstate the parole either upon such terms and conditions as were originally prescribed or as may be prescribed in addition thereto or in lieu thereof.

§53-263. Discharge of parolee.—When any paroled prisoner has faithfully performed all of the conditions and obligations imposed upon him by the terms of his parole for such time as shall satisfy the Parole Board that his final release is not incompatible with his welfare or that of society, the Parole Board may enter a final order of discharge and issue to the paroled prisoner a certificate of discharge.

§53-264. Release of prisoner subject to parole.—The Director of the Department of Welfare and Institutions shall release, or cause to be released, into the custody of the Parole Board or any of its probation and parole officers or the Director of Parole, any prisoner subject to parole under the laws of this State whenever directed so to do by the Parole Board or by the Director of Parole.

§ 53-296. Convicts previously sentenced to like punishment; additional confinement.—When a person convicted of an offense, and sentenced to confinement therefor in the penitentiary, is received therein, if it shall come to the knowledge of the Director of the Department of Welfare and Institutions that he has been sentenced to a like punishment in the United States prior to the sentence he is then serving, the Director of the Department of Welfare and Institutions shall give information thereof without delay to the Circuit Court of the city of Richmond. Such court shall cause the convict to be brought before it, to be tried upon an information filed, alleging the existence of records of prior convictions and the identity of the prisoner with the person named in each. The prisoner may deny the existence of any such records, or that he is the same person named therein, or both. Either party may, for good cause shown, have a continuance of the case for such reasonable time as may be fixed by the court. The existence of such records, if denied by the prisoner, shall be first determined by the court, and if it be found by the court that such records exist, and the prisoner says that he is not the same person mentioned in such records, or remains silent, his plea, or the fact of his silence, shall be entered of record, and a jury of bystanders shall be impaneled to inquire whether the convict is the same person mentioned in the several records. If they find that he is not the same person, he shall be remanded to the penitentiary; but if they find that he is the same person, or if he acknowledge in open court after being duly cautioned, that he is the same person, the court may sentence him to further confinement in the penitentiary for a period of not exceeding five years, if he has been once before sentenced in the United States to confinement in the penitentiary; but if he has been twice sentenced in the United States to such confinement, he may be sentenced to

be confined in the penitentiary for such additional time as the court trying the case may deem proper. This section, however, shall not apply to successive convictions of petit larceny.

UNIFORM ACT FOR OUT-OF-STATE PAROLEE SUPERVISION

(Code of Virginia, Section 53-289; Code of Georgia, Section 27-2701a)

Form of compact.—The form of the compact shall be substantially as follows:

A compact entered into by and among the contracting states, signatures hereto, with the consent of the Congress of the United States of America, granted by an act entitled "an act granting the consent of Congress to any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and for other purposes".

The contracting States solemnly agree:

(1) That it shall be competent for the duly constituted judicial and administrative authorities of a State party to this compact (herein called "sending State"), to permit any person convicted of an offense within such State and placed on probation or released on parole to reside in any other State party to this compact (herein called "receiving State"), while on probation or parole, if

(a) Such person is in fact a resident of or has his family residing within the receiving State and can obtain employment there;

(b) Though not a resident of the receiving State and not having his family residing there, the receiving State consents to such person being sent there.

Before granting such permission, opportunity shall be granted to the receiving State to investigate the home and prospective employment of such person.

A resident of the receiving State, within the meaning of this compact, is one who has been an actual inhabitant of such State continuously for more than one year prior to his coming to the sending State and has not resided within the sending State more than six continuous months immediately preceding the commission of the offense for which he has been convicted.

(2) That each receiving State will assume the duties of visitation of and supervision over probationers or parolees of any sending State and in the exercise of those duties will be governed by the same standards that prevail for its own probationers and parolees.

(3) That duly accredited officers of a sending State may at all times enter a receiving State and there apprehend and retake any person on probation or parole. For that purpose no formalities will be required other than establishing the authority of the officer and the identity of the person to be retaken. All legal requirements to obtain extradition of fugitives from justice are hereby expressly waived on the part of States party hereto, as to such persons. The decision of the sending State to retake a person on probation or parole shall be conclusive upon and not reviewable within the receiving State: Provided, however, that if at the time when a State seeks to retake a probationer or parolee there should be pending against him within the receiving State any criminal charge, or he should be suspected of having committed within such State a criminal offense, he shall not be retaken without the consent of the receiving State until discharged from prosecution or from imprisonment for such offense.

(4) That the duly accredited officers of the sending State will be permitted to transport prisoners being retaken

through any and all State parties to this compact, without interference.

(5) That the Governor of each State may designate an officer who, acting jointly with like officers of other contracting States, if and when appointed, shall promulgate such rules and regulations as may be deemed necessary to more effectively carry out the terms of this compact.

(6) That this compact shall become operative immediately upon its execution by any State as between it and any other State or States so executing. When executed it shall have the full force and effect of law within such State, the form of execution to be in accordance with the laws of the executing State.

(7) That this compact shall continue in force and remain binding upon each executing State until renounced by it. The duties and obligations hereunder of a renouncing State shall continue as to parolees or probationers residing therein at the time of withdrawal until retaken or finally discharged by the sending State. Renunciation of this compact shall be by the same authority which executed it, by sending six months' notice in writing of its intention to withdraw from the compact to the other States party hereto. (1938, p. 1001; Michie Code 1942, §4788a; R. P. 1948, §53-289.)

FEDERAL STATUTES

Section 2241. Power to Grant Writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial. June 25, 1948, c. 646, 62 Stat. 964; May 24, 1949, c. 139, §112, 63 Stat. 105.

* * *

Section 2254. State Custody; Remedies in State Courts

An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State

court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented. June 25, 1948, c. 646, 62 Stat. 967.

RULE OF THE SUPREME COURT OF THE UNITED STATES

Rule 49. Custody of Prisoners

1. Pending review of a decision refusing a writ of habeas corpus, or refusing a rule to show cause why the writ should not be granted, the custody of the prisoner shall not be disturbed, except by order of the court wherein the case is then pending, or of a judge or justices thereof, upon a showing that custodial considerations require his removal. In such cases, the order of the court or judge or justice will make appropriate provision for substitution so that the case will not become moot.

RULE OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Rule 25. Custody of Prisoners Pending a Review of Proceedings in Habeas Corpus

1. Pending review of a decision refusing a writ of habeas corpus, the custody of the prisoner shall not be disturbed.

SUPREME COURT OF THE UNITED STATES

No. 77.—October Term, 1962.

John R. Jones, Petitioner, v. W. K. Cunningham, Jr., Superintendent of Virginia State Penitentiary. | On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[January 14, 1963.]

Mr. Justice Black delivered the opinion of the Court.

A United States District Court has jurisdiction under 28 U. S. C. § 2241 to grant a writ of habeas corpus "to a prisoner . . . in custody in violation of the Constitution . . . of the United States." The question in this case is whether a state prisoner who has been placed on parole is "in custody" within the meaning of this section so that a Federal District Court has jurisdiction to hear and determine his charge that his state sentence was imposed in violation of the United States Constitution.[1]

In 1953 petitioner was convicted in a Virginia state court of an offense requiring confinement in the state penitentiary, and as this was his third such offense he was sentenced to serve 10 years in the state penitentiary. In 1961 he filed this petition for habeas corpus in the United States District Court for the Eastern District of Virginia, alleging that his third-offender sentence was based in part upon a 1946 larceny conviction which was invalid because his federal constitutional right to counsel had been denied at the 1946 trial. The District Court dismissed the petition but the Court of Appeals for the Fourth Circuit granted a certificate of probable cause and leave to appeal

[1] Parole in this case was granted while petitioner's appeal was pending in the Court of Appeals.

in forma pauperis. Shortly before the case came on for oral argument before the Court of Appeals petitioner was paroled by the Virginia Parole Board. The parole order placed petitioner in the "custody and control" of the Parole Board and directed him to live with his aunt and uncle in LaFayette, Georgia. It provided that his parole was subject to revocation or modification at any time by the Parole Board and that petitioner could be arrested and returned to prison for cause. Among other restrictions and conditions, petitioner was required to obtain the permission of his parole officer to leave the community, to change residence, or to own or operate a motor vehicle. He was further required to make monthly reports to his parole officer, to permit the officer to visit his home or place of employment at any time, and to follow the officer's instructions and advice. When petitioner was placed on parole, the Superintendent of the Virginia State Penitentiary, who was the only respondent in the case, asked the Court of Appeals to dismiss the case as moot since petitioner was no longer in his custody. Petitioner opposed the motion to dismiss but, in view of his parole to the custody of the Virginia Parole Board, moved to add its members as respondents. The Court of Appeals dismissed, holding that the case was moot as to the superintendent because he no longer had custody or control over petitioner "at large on parole." It refused to permit the petitioner to add the Parole Board members as respondents because they did not have "physical custody" of the person of petitioner and were therefore not proper parties. 294 F. 2d 608. We granted certiorari to decide whether a parolee is "in custody" within the meaning of 28 U. S. C. § 2241 and is therefore entitled to invoke the habeas corpus jurisdiction of the United States District Court. 369 U. S. 809.

The habeas corpus jurisdictional statute implements the constitutional command that the writ of habeas corpus

be made available.[2] While limiting its availability to those "in custody," the statute does not attempt to mark the boundaries of "custody" nor in any way other than by use of that word attempt to limit the situations in which the writ can be used. To determine whether habeas corpus could be used to test the legality of a given restraint on liberty, this Court has generally looked to common-law usages and the history of habeas corpus both in England and in this country.[3]

In England, as in the United States, the chief use of habeas corpus has been to seek the release of persons held in actual, physical custody in prison or jail. Yet English courts have long recognized the writ as a proper remedy even though the restraint is something less than close physical confinement. For example, the King's Bench as early as 1722 held that habeas corpus was appropriate to question whether a woman alleged to be the applicant's wife was being constrained by her guardians to stay away from her husband against her will.[4] The test used was simply whether she was "at her liberty to go where she please[d]."[5] So also, habeas corpus was used in 1763 to require the production in court of an indentured 18-year-old girl who had been assigned by her master to another man "for bad purposes."[6] Although the report indicates no restraint on the girl other than the covenants of the indenture, the King's Bench ordered that she "be discharged from all restraint, and be at liberty to go where she will."[7] And more than a century ago an Eng-

---

[2] "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U. S. Const., Art. I, § 9.

[3] See, *e. g.*, *McNally* v. *Hill*, 293 U. S. 131, 136 (1934); *Ex parte Parks*, 93 U. S. 18 (1876).

[4] *Rex* v. *Clarkson*, 1 Stra. 444, 93 Eng. Rep. 625 (K. B. 1722).

[5] *Id.*, at 445, 93 Eng. Rep., at 625.

[6] *Rex* v. *Delaval*, 3 Burr. 1434, 97 Eng. Rep. 913 (K. B. 1763).

[7] *Id.*, at 1437, 97 Eng. Rep., at 914.

lish court permitted a parent to use habeas corpus to obtain his children from the other parent, even though the children were "not under imprisonment, restraint, or duress of any kind." [8] These examples show clearly that English courts have not treated the Habeas Corpus Act of 1679, 31 Car. II, c. 2—the forerunner of all habeas corpus acts—as permitting relief only to those in jail or like physical confinement.

Similarly, in the United States the use of habeas corpus has not been restricted to situations in which the applicant is in actual, physical custody. This Court itself has repeatedly held that habeas corpus is available to an alien seeking entry into the United States,[9] although in those cases each alien was free to go anywhere else in the world. "[H]is movements," this Court said, "are restrained by authority of the United States, and he may by habeas corpus test the validity of his exclusion." [10] Habeas corpus has also been consistently regarded by lower federal courts as the appropriate procedural vehicle for questioning the legality of an induction or enlistment into the military service.[11] The restraint, of course, is clear in such cases, but it is far indeed from the kind of "present physical custody" thought by the Court of Appeals to be required. Again, in the state courts, as in England, habeas corpus has been widely used by parents disputing

[8] *Earl of Westmeath* v. *Countess of Westmeath*, as set out in a reporter's footnote in *Lyons* v. *Blenkin*, 1 Jac. 245, 264, 37 Eng. Rep. 842, 848 (Ch. 1821); accord *Ex parte M'Clellan*, 1 Dow. 81 (K. B. 1831).

[9] *E. g., Brownell* v. *Tom We Shung*, 352 U. S. 180, 183 (1956); *Shaughnessy* v. *United States ex rel. Mezei*, 345 U. S. 206 (1953); *United States ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537 (1950); *United States* v. *Jung Ah Lung*, 124 U. S. 621, 626 (1888).

[10] *Shaughnessy* v. *United States ex rel. Mezei*, *supra* note 10, at 213.

[11] *E. g., Ex parte Fabiani*, 105 F. Supp. 139 (D. C. E. D. Pa. 1952); *United States ex rel. Steinberg* v. *Graham*, 57 F. Supp. 938 (D. C. E. D. Ark. 1944).

over which is the fit and proper person to have custody of their child,[10] one of which we had before us only a few weeks ago.[11] History, usage, and precedent can leave no doubt that, besides physical imprisonment, there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus.

Respondent strongly urges upon us that however numerous the situations in which habeas corpus will lie prior decisions of this Court conclusively determine that the liberty of a person released on parole is not so restrained as to permit the parolee to attack his conviction in habeas corpus proceedings. In some of those cases, upon which the Court of Appeals in this case also relied, the petitioner had been completely and unconditionally released from custody:[12] such cases are obviously not controlling here where petitioner has not been unconditionally released. Other cases relied upon by respondent held merely that the dispute between the petitioner and the named respondent in each case had become moot because that particular respondent no longer held the petitioner in his custody.[13] So here, as in the cases last mentioned

---

[10] *E. g., Boardman* v. *Boardman*, 135 Conn. 124, 138 (1948); *Barlow* v. *Barlow*, 141 Ga. 535, 536–537 (1914); *In re Savill*, 36 Nev. 171, 174 (1913) ("[T]he question of physical restraint need is given little or no consideration where a lawful right is asserted to retain possession of the child."). See also *In re Hollopeter*, 52 Wash. 41 (1909) (husband held entitled to release of his wife from restraint by her parents); *In re Chace*, 26 R. I. 351, 358 (1904) (wife held entitled to husband's society free of restraint by his guardian).

[11] *Ford* v. *Ford*, 371 U. S. 187 (1962).

[12] *Parker* v. *Ellis*, 362 U. S. 574 (1960); *Zimmerman* v. *Walker*, 319 U. S. 744 (1943); *Tornello* v. *Hudspeth*, 318 U. S. 792 (1943).

[13] *United States ex rel. Lynn* v. *Downer*, 322 U. S. 756 (1944); *United States ex rel. Innes* v. *Crystal*, 319 U. S. 755 (1943); *Webb* v. *Squier*, 315 U. S. 810 (1942).

when the petitioner was placed on parole, his cause against the Superintendent of the Virginia State Penitentiary became moot because the superintendent's custody had come to an end, as much as if he had resigned his position with the State. But it does not follow that this petitioner is wholly without remedy. His motion to add the members of the Virginia Parole Board as parties respondent squarely raises the question, not presented in our earlier cases, of whether the Parole Board now holds the petitioner in its "custody" within the meaning of 28 U. S. C. § 2241 so that he can by habeas corpus require the Parole Board to point to and defend the law by which it justifies any restraint on his liberty.

The Virginia statute provides that a paroled prisoner shall be released "into the custody of the Parole Board,"[1] and the parole order itself places petitioner "under the custody and control of the Virginia Parole Board." And in fact, as well as in theory,[2] the custody and control of the Parole Board involves significant restraints on petitioner's liberty because of his conviction and sentence, which are in addition to those imposed by the State upon the public generally. Petitioner is confined by the parole order to a particular community, house, and job at the sufferance of his parole officer. He cannot drive a car without permission. He must periodically report to his parole officer, permit the officer to visit his home and job at any time, and follow the officer's advice. He is admonished to keep good company and good hours, work regularly, keep away from undesirable places, and live a clean, honest, and temperate life. Petitioner must not only faithfully obey these restrictions and conditions, but

[1] Va. Code Ann. § 53-264.

[2] See *Anderson v. Corall*, 263 U. S. 193, 196 (1923): "While [parole] is an amelioration of punishment, it is in legal effect imprisonment." von Hentig, Degrees of Parole Violation and Graded Remedial Measures, 35 J. Crim. L. & Criminology 363 (1945).

he must live in constant fear that a single deviation, however slight, might be enough to result in his being returned to prison to serve out the very sentence he claims was imposed upon him in violation of the United States Constitution. He can be rearrested at any time the Board or parole officer believes he has violated a term or condition of his parole,[14] and he might be thrown back in jail to finish serving the allegedly invalid sentence with few, if any, of the procedural safeguards that normally must be and are provided to those charged with crime.[15] It is not relevant that conditions and restrictions such as these may be desirable and important parts of the rehabilitative process; what matters is that they significantly restrain petitioner's liberty to do those things which in this country free men are entitled to do. Such restraints are enough to invoke the help of the Great Writ. Of course, that writ always could and still can reach behind prison walls and iron bars. But it can do more. It is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty. While petitioner's parole releases him from immediate physical imprisonment, it imposes conditions which significantly confine and restrain his freedom; this is enough to keep him in the "custody" of the members of the Virginia Parole Board within the meaning of the habeas corpus statute; if he can prove his allegations this custody is in violation of the

---

[14] Va. Code Ann. §§ 53-258, 53-259. In fact, all the Board has to find is that "there was a probable violation."

[15] Even the condition which requires petitioner not to violate any penal laws or ordinances, at first blush innocuous, is a significant restraint because it is the Parole Board members or the parole officer who will determine whether such a violation has occurred.

The conditions involved in this case appear to be the common ones. See Giardini, The Parole Process, 12-16 (1959).

Constitution, and it was therefore error for the Court of Appeals to dismiss his case as moot instead of permitting him to add the Parole Board members as respondents.

Respondent also argues that the District Court had no jurisdiction because the petitioner had left the territorial confines of the district. But this case is not like *Ahrens v. Clark*, 335 U. S. 188 (1948), upon which respondent relies, because in that case petitioners were not even detained in the district when they originally filed their petition. Rather, this case is controlled by our decision in *Ex parte Endo*, 323 U. S. 283, 304–307 (1944), which held that a District Court did not lose its jurisdiction when a habeas corpus petitioner was removed from the district so long as an appropriate respondent with custody remained. Here the members of the Parole Board are still within the jurisdiction of the District Court, and they can be required to do all things necessary to bring the case to a final adjudication.

The case is reversed and remanded to the Court of Appeals with directions to grant petitioner's motion to add the members of the Parole Board as respondents and proceed to a decision on the merits of petitioner's case.

Reversed.